The Tax Institute

Tax Update

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- Intellectual Property
- Corporate Governance
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1. Tax Update Pitstop

The Tax Update Pitstop provides a quick reference to the top 5 tax matters from the month as determined by our experts.

Tax Update Matter	Impact Summary	Further Detail
Quy	The AAT has handed down a decision on the ordinary concepts test for determining if an individual is a resident of Australia. The case is a continuation of a recent trend of cases that have placed significant emphasis on a taxpayer's 'continuity of association' with Australia in concluding that the taxpayer remained a resident of Australia.	Page 7
AusNet Services	A taxpayer was unsuccessful in contending that the conditions for the Division 615 rollover were not 'satisfied' for an arrangement where shareholders exchanged shares in an entity for shares in a new holding entity. The taxpayer contended that, as the transaction occurred with a similar transaction involving other entities, the transaction did not meet the description of a "scheme for reorganising" the affairs of the single entity, as was required by Division 615.	Page 11
Amendments to foreign investment rules	The Federal Government has introduced Treasury Laws Amendment (Foreign Investment) Bill 2024 which makes changes to the foreign investment rules, including, significantly, amending the *International Tax Agreements Act 1953* (Cth) so that foreign investment fees and state and territory property taxes are not affected by Australia's double tax agreements . These changes will operate retrospectively 1 July 2018.	Page 32
Self-education expenses	The ATO has finalised its ruling on when self-education expenses are deductible.	Page 37
Changes to TASA and Code	Significant changes have been made to the Code of Professional Conduct for tax agents, including an increased notification requirement for breaches of the Code from 1 July 2024.	Page 72

2. Cases

2.1 Quy – residency according to ordinary concepts

Facts

Trong Quy was born in Vietnam and obtained Australian citizenship in 1978.

Trong is a mechanical engineer. In January 1998, Trong's employer, C&BI Constructions Australia, posted him in Dubai, United Arab Emirates, for work. Trong, his wife and three daughters moved with him at this time.

In late 2009, the Global Financial Crisis reduced work in Dubai and Trong moved back to Australia with his family and continued to work for C&BI Constructions in a new position.

On 13 September 2015, Trong accepted an international assignment to Dubai.

Trong's employment conditions were governed by three documents. These documents relevantly set out:

1. Trong was being offered an international assignment with CB&I Eastern Anstalt, being the host company. The host country was Dubai;
2. the contract commenced on 29 September 2015 and would end at the completion of the international assignment;
3. the remuneration package included that superannuation guarantee contributions would be made;
4. Trong would be paid the base salary to his Australian bank account and the remainder of his salary was to be paid into a United Arab Emirates (**UAE**) bank account so that payment of salary could be made in accordance with the Wages Protection System which is compulsory for all employers registered with the Ministry of Labour in the UAE;
5. there were various assignment benefits including a cost-of-living allowance, provision of a vehicle, provision of temporary accommodation until he found more suitable permanent accommodation, cost of accommodation for a maximum of one year, furniture and furnishings allowance, relocation allowance of US$5,000;
6. CB&I would meet all host country tax liabilities arising solely from and related to Trong’s salary and other employment income received from CB&I during Trong’s assignment. CB&I would arrange for any tax returns to be lodged on behalf of Trong;
7. CB&I’s policy is that Trong's total tax burden with respect to Trong's work-related earnings while on assignment will not exceed the amount that would have been incurred if he had remained in the Home Location for the entire year. Trong would be tax equalised for the duration of his assignment; and
8. leave provisions and repatriation entitlements at the end of the assignment.

Trong took his clothes with him to Dubai and a few musical instruments. He purchased his own cutlery and crockery in Dubai.

In September 2015, Trong's two older daughters were undertaking university studies in Perth and his youngest daughter was completing her final year of high school. Trong's daughters did not relocate to Dubai with him. Trong's wife travelled to Dubai from Australia to visit Trong but spent most of her time in Australia.

Trong owned properties in Parramatta and Merrylands, New South Wales and Beldon, Western Australia. Trong purchased the property in Beldon as the family home in 2010, when relocating to Perth. During the tax years relevant to the proceedings, at least one of Trong’s daughters resided in the Beldon property rent free. At all times, Trong paid the mortgage and all costs associated with the Beldon property, including the utility costs.

Trong also owned, registered, and maintained three cares and a motorcycle. Trong financially supported his wife and daughters. The New South Wales properties were tenanted.

Trong was provided with employer-sponsored UAE residency permits. Those permits were issued for the periods 21 October 2015 to 20 October 2017, 27 September 2017 to 26 September 2019 and 1 September 2019 to 31 August 2021. These permits allowed Trong to live and work in the UAE. Trong's wife held a spouse-sponsored UAE residency permit which commenced on 14 January 2016 and expired on 21 November 2019. Trong was not eligible to become a citizen of the UAE.

Trong resided in the same apartment in Downtown, Dubai for the duration of his international assignment. The lease showed that the tenant was CB&I Eastern Anstalt. Trong also purchased a car while in Dubai. During the income years ended 30 June 2016 to 2020, Trong's immigration records indicated the following:

Financial Year	Days in Australia	Days out of Australia	No. of Departures
2016	119	247	3
2017	47	318	3
2018	29	336	2
2019	34	331	2
2020	41	325	2

In February 2021, Trong moved to Thailand on a further international assignment with CB&I.

Trong renewed his Western Australian driver's licence in 2017 and in 2022. At all times his recorded address with the Department of Transport was the Beldon property address.

Trong filed his income tax returns for the income years ended 30 June 2016 to 2020 declaring the income he received from CB&I. The Commissioner issued notices of assessment for each year. On 29 March 2021, Trong lodged objections in relation to those notices of assessment. Trong objected to the notices of assessment on the basis that he believed he was not a resident of Australia for taxation purposes.

On 6 January 2022, the Commissioner disallowed Trong's objection regarding his residency status. On 29 March 2022, Trong applied to the AAT for review of the Commissioner's objection decision.

When asked by the AAT what his long-term intentions were, Trong said that he would complete his current contract in Thailand, which he thinks will be another three to five years and then retire. Trong said he would return to Australia to retire, but likely to his Sydney residence because that is where his wife's family is located.

In respect of the ordinary concepts test, the Commissioner contended that Trong had maintained extensive connections to Australia and, taking the evidence into account, was a resident in Australia for tax purposes for each of the relevant tax years. In respect of the domicile test, the Commissioner contended that on departing Australia, Trong did not take any steps commensurate with an individual intending to quit Australia and set up a permanent place of abode elsewhere. Whilst Trong may have been physically present in Dubai, when viewed objectively, the Commissioner contended there was no intention to make that his permanent place of abode.

Issues

1. Was Trong an Australian resident according to the ordinary concepts test for the income years ended 30 June 2016 to 30 June 2020 such that income he derived in Dubai was assessable in Australia?

2. Was Trong's domicile in Australia for the income years ended 30 June 2016 to 30 June 2020 such that income he derived in Dubai was assessable in Australia?

Decision

Ordinary concepts test

The ordinary concepts test considers whether a person 'resides' in Australia within the ordinary meaning of that term. The courts have held that regard must be had to "the nature, duration and quality of physical presence [of a person] in a particular place as well as [their] intention" in determining where the person resides. A person can reside in more than one country at one time.

The AAT confirmed that a person's continuity of association and intention to return to and to continue to treat a place as home are relevant determinative factors in applying the ordinary concepts test.

The AAT was satisfied that, despite being absent from Australia for most of the tax years, Trong maintained an intention to return to Australia and an attitude that Australia remained his home. The AAT considered that such an intention, attitude and continued connection to Australia was evidenced by:

1. Trong left his wife and children in his family home while he worked in Dubai, continuing to fully support his family financially and choosing to spend each of his leave periods back with his family in Australia staying in the family home;
2. Trong's Perth home was never offered for rent or sale during the relevant tax years. His multiple vehicles were stored on the property and his furniture remained in his home. Additionally, he maintained all costs of the property, including utility costs. Trong maintained his driver's licence;
3. Trong's intention to retire in Australia, specifically Sydney where his family is located. Trong expressed the importance of family which is consistent with an intention to return to live close to family when his employment ceases;
4. there was no evidence to indicate that he ever intended to reside in Dubai beyond his international work assignment. He held a visa and accommodation which was tied to his employment which preventing him from establishing a real connection with his residence in Dubai. He did not take furnishings from Australia to Dubai or take the furnishings he purchased in Dubai to his next assignment. He failed to demonstrate any connection to Dubai outside his employment;
5. he maintained his Australian private health insurance, stating that it covered his adult daughters and both himself and his wife during the times that they were visiting Australia or when they needed urgent medical treatment. The AAT noted, however, that both Trong and his wife's medical treatment was covered by CB&I whilst on assignment in Dubai. If he did not intend to be an Australian citizen, it would have been open to him to seek travel insurance provided him and his wife only needed intermitted cover whilst in Australia and for emergencies; and
6. Trong's wife was not physically present with Trong for more than half of the relevant income years. Rather she was in Australia in their family home. While Trong's wife's actions are not determinative of Trong's residency status, it strengthens his ties to Australia.

Accordingly, the AAT found that Trong had a long-term plan to return to Australia for family purposes and through his behaviour could not prove a definite plan in any of the relevant income years to abandon Australia completely, ether for a period of time or indefinitely. For the purposes of the ordinary concepts test, Trong was a resident of Australia for the income years ended 30 June 2016 to 2020.

Domicile Test

The AAT noted that the domicile test has two parts:

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1. is the person is domiciled in Australia?
2. if so, is the Commissioner is satisfied that the person's permanent place of abode is outside Australia?

A person's domicile is determined by common law rules as modified by the *Domicile Act 1982* (Cth). Every person has a domicile of origin that arises at birth. This domicile of origin cannot be lost or displaced and can only be replaced by a domicile of choice. Unless a person has established a new domicile by the combination of actions and intentions as to residence, a person's pre-existing domicile survives.

The AAT was not satisfied that Trong had proven that he was domiciled anywhere but Australia. The reasoning in respect of the ordinary concepts test formed part of the AAT's decision that Trong's domicile of choice was Australia, and there was no evidence before the AAT that indicated the contrary.

The AAT also considered whether Trong's permanent place of abode was outside of Australia for tax purposes. The AAT confirmed that to establish a permanent place of abode, a person does not need to intend for it to be so indefinitely, however what they need to establish is that it is their permanent place of abode rather than their temporary place of abode. Consideration is given to the continuity and duration of the person's presence, and the durability of their association with the particular place.

The AAT found that Trong's engagement with Dubai and the UAE was not consistent with a person who intended to permanently reside there. The lease on the apartment Trong lived in was in his host company's name and paid for by them, there was minimal discretionary or leisure spending in Dubai besides food purchases, and the quality of furniture used was not indicative of setting up a new home.

Additionally, Trong was not able to produce a list of any organisations or social clubs he was a part of in Dubai for the last seven years he lived there, and his routine in Dubai did not indicate or reference to social networks or friendships.

The AAT concluded that Trong had not abandoned his residence in Australia during the relevant income years, nor had he established a permanent place of abode in Dubai or anywhere else outside of Australia. For the purposes of the domicile test, Trong was a resident of Australia for the income years ended 30 June 2016 to 30 June 2020.

The AAT was not satisfied that Trong was not a resident of Australia for the income years ended 30 June 2016 to 30 June 2020. The decisions under review were affirmed.

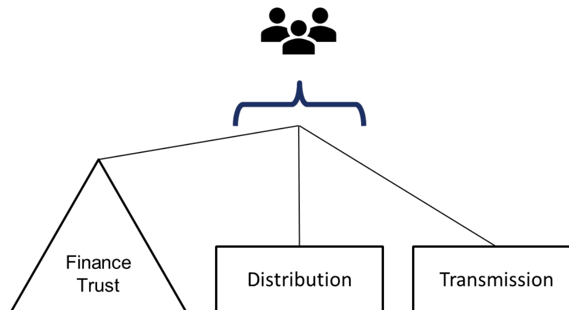
COMMENT – the approach to the ordinary concepts test in this case is consistent with a number of recent AAT decisions (for example, *Handsley and Commissioner of Taxation* [2019] AATA 917) that place significant emphasis on a person's 'continuity of association' with Australia in determining if the person still 'resides' in Australia. The approach appears to be that the resides test requires a determination as to whether Australia is still the appropriately regarded as the person's 'home'.

Citation *Quy v Commissioner of Taxation* [2024] AATA 245 (Member D Mitchell, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/245.html

2.2 AusNet Services – Division 615 roll-over

Facts

AusNet Services was a stapled group of entities that consisted of AusNet Services (Transmission) Ltd (**Transmission**), AusNet Services Finance Trust (**Finance**) and AusNet Services (Distribution) Ltd (**Distribution**). The stapling was effected by way of a stapling deed dated 19 October 2005. Under that deed, each unit in Finance was stapled to a share in Transmission and a share in Distribution, such that none could be transferred or otherwise dealt with without the others. Together, the stapled securities had been listed on the Australian and Singaporean stock exchanges.



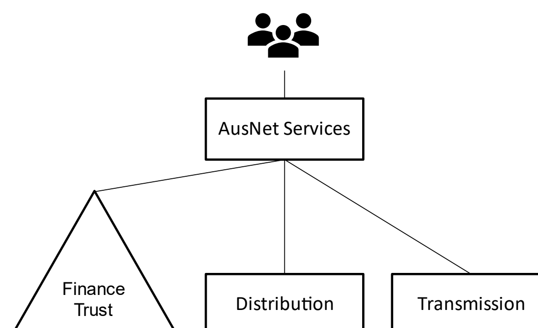
Each of Transmission and Distribution was a head company of a tax consolidated group.

The ATO reviewed the financing arrangements between the stapled groups and terms of settlement were reached with the Commissioner in 2015. Following this, the stapling structure became sub-optimal for security holders. The directors of the stapled group decided that it would be in the interests of security holders to interpose a single holding company between the security holders and each of the stapled entities.

On 11 December 2014, AusNet Services Limited was incorporated as a shelf company with two ordinary fully paid $1 shares issued to a wholly-owned subsidiary of Distribution.

On 14 April 2015, Transmission, Distribution, Finance and AusNet Services Limited entered into an Implementation Deed under which they agreed to undertake a restructure that would involve the following steps:

1. Step 1: The shares and units in Transmission, Distribution, Finance would be de-stapled;
2. Step 2: AusNet Services Limited would acquire all of the shares in Transmission;
3. Step 3: AusNet Services Limited would elect to continue the tax consolidated group of Transmission;
4. Step 4: AusNet Services Limited would acquire all of the units in Finance; and
5. Step 5: AusNet Services Limited would acquire all of the shares in Distribution.



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On 18 June 2015, AusNet Services Limited made a written election under section 615-30(1) of the ITAA 1997 to apply Division 615 of the ITAA 1997 to the acquisition by AusNet Services Limited of the units in Finance and shares in Transmission and Distribution.

On 1 July 2015, the Commissioner issued CR 2015/45 which ruled that the conditions for roll-over relief under Division 615 of ITAA 1997 were satisfied in relation to the disposal of the shares in Transmission and Distribution, and the units in Finance, to AusNet Services Limited. As a result, the security holders were eligible to choose to apply the roll-over under Division 615 of ITAA 1997 in respect of their disposals.

AusNet Services Limited lodged income tax returns for the income years ended 31 March 2016 to 31 March 2020 on the basis that Division 615 applied in connection with the acquisition of its shares in Distribution.

On 13 October 2020 and 21 April 2021, AusNet Services Limited objected to the assessments issued by the Commissioner on the basis that Division 615 of the ITAA 1997 did not apply to the acquisition of shares in Distribution. AusNet Services Limited did not dispute the application of Division 615 of ITAA 1997 to its acquisition of shares in Transmission and acquisition of units in Finance.

AusNet Services Limited argued that Division 615 of ITAA 1997 did not apply to the scheme of arrangement by which it came to be the holder of the shares in Distribution, meaning it could not have made a valid roll-over election under that Division and was, therefore, entitled to an increase in the cost bases of the assets of the former tax consolidated group headed by Distribution. An uplift in those cost bases would have the effect of increasing the capital allowance deductions that could be claimed by AusNet Services Limited.

AusNet Services Limited contended that the condition in section 615-5(1)(c) of ITAA 1997 was not satisfied. Section 615-5(1)(c) of ITAA 1997 sets out circumstances in which roll-over relief may be chosen and relevantly provides*:*

> *(1) You can choose to obtain a roll-over if:*
>
> *…*
>
> *(c) under a scheme for reorganising its affairs, the exchanging members dispose of all their shares or units in it to a company (the interposed company) in exchange for shares in the interposed company (and nothing else) …*

AusNet Services Limited asserted that there was no scheme for reorganising a single entity's affairs, as required by the terms of the section; rather, there was a scheme for reorganising Distribution's affairs and the affairs of a different entity. AusNet Services Limited further contended that section 615-5(1)(c) of ITAA 1997 was not satisfied because the shareholders of Distribution did not receive only shares in the taxpayer but also something else in the form of a "boost" in the value of their existing shares in AusNet Services Limited, acquired as a consequence of the Transmission and Finance schemes.

AusNet Services Limited also contended that the requirements set out in section 615-20(2)(a) of ITAA 1997 were not satisfied. Section 615-20 of ITAA 1997 deals with requirements relating to the interests in the original entity. Section 615-20(2)(a) of ITAA 1997 relevantly provides:

> *(2) The following ratios must be equal:*
>
> *(a) the ratio of:*
>
> *(i) the market value of each exchanging member's shares in the interposed company; to*
>
> *(ii) the market value of the shares in the interposed company issued to all the exchanging members (worked out immediately after the completion time);*
>
> *(b) the ratio of:*

(i) *the market value of that member's shares or units in the original entity that were disposed of, redeemed or cancelled under the scheme; to*
(ii) *the market value of all the shares or units in the original entity that were disposed of, redeemed or cancelled under the scheme (worked out immediately before the first disposal, redemption or cancellation).*

AusNet Services Limited argued that:

1. the denominator in both ratios included only those shares either issued or disposed of under the Distribution scheme;
2. the numerator for the first ratio included all shares issued under the Transmission scheme, the Finance scheme and the Distribution scheme; and
3. the numerator in the second ratio included only those shares disposed of under the Distribution scheme,

meaning the first ratio is three times the second ratio.

The crux of the arguments made by AusNet Services Limited was that Division 615 of ITAA 1997 was premised on a roll-over involving a valuable or substantial original entity and the interposition of a 'shelf company' of nominal value. AusNet Services Limited asserted that, in essence, there had been a restructure of 2 valuable entities because, at the time of the scheme, the interposed company was not a 'shelf company'. As the Transmission shares and Finance units had simultaneously been acquired, AusNet Services Limited contended it was a company with a substantial market value.

The Commissioner disallowed the objections.

AusNet Services applied to the Federal Court for review of the objection decision.

Issue

Did Division 615 of ITAA 1997 apply to the Distribution scheme?

Decision

Hespe J held that there is no requirement in Division 615 of ITAA 1997 that the interposed company be a 'shelf company'. Her Honour said it was apparent that the explanatory material to the legislation and ATO guidance did not contemplate the reorganisation of a stapled entity where all security holders held the same proportionate share in 3 stapled entities and all security holders were issued with the same proportionate interest in a new holding company in exchange for the proportionate interests they had held in the 3 stapled entities. However, her Honour found that, based on a construction of the statutory language, Division 615 could apply to such a restructure.

Hespe J rejected AusNet Services Limited's contention that the phrase 'scheme for reorganising its affairs' in section 615-5 of ITAA 1997 was incapable of encompassing a scheme that also impacted the affairs of another entity. Her Honour considered that the reorganisation envisaged by section 615-5 of ITAA 1997 involved the exchange of shares in the company whose affairs were being reorganised for shares in another interposed company. Her Honour said that the interposed company’s affairs would necessarily be impacted by the reorganisation.

Her Honour held that AusNet Services Limited's argument that the shareholders of Distribution did not only receive shares but a “boost” in the value of their existing shares failed to consider the interdependent nature of each of the Transmission, Finance and Distribution schemes. Hespe J rejected the assumption that the shares

issued in AusNet Services Limited immediately prior to the completion of the Distribution scheme had an equal market value to the agreed market value of Transmission and Finance.

Hespe J also rejected the construction of section 615-20(2)(a)(i) of ITAA 1997 by AusNet Services Limited, regarding the calculation of the ratio. Her Honour held that reference to "each exchanging member's shares" in section 615-20 of ITAA 1997 was to be construed as a reference to only the shares acquired by each member in their capacity as a shareholder of Distribution in exchanging their shares in Distribution for shares in AusNet Services Limited.

The appeal was dismissed.

TIP - when interposing a head company, the three most common rollovers to consider as follows:

1. Sub-division 122-A rollover – where an individual or trustee disposes of CGT asset (or assets) to wholly owned company;
2. Division 615 rollover – where two or more shareholders/unitholders exchange interests for shares in interposed company (and nothing else);
3. Sub-division 124-M rollover – where a shareholder exchanges shares in one entity for shares in another entity.

There are different requirements and consequences for each of the three rollovers.

COMMENT – the consequence for Ausnet Services' argument in this case being successful is that Division 615 rollover would not have been available for the shareholders of Distribution on the CGT event that occurred when their shares were transferred to Ausnet Services. It may that, in such a case, the conditions for the Sub-division 124-M rollover were satisfied such that there would have no adverse outcome for the shareholders. Where the conditions for both the Division 615 rollover and the Sub-division 124-M rollover are satisfied, only the Division 615 rollover can be applied.

Citation *AusNet Services Limited v Commissioner of Taxation* [2024] FCA 90 (Hespe J, Victoria)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/90.html

2.3 Chloe Adolphi Family Trust – rectification of trust deed

Facts

The Chloe Adolphi Family Trust was established on 16 April 2021, with Chloe Adolphi Pty Ltd as trustee, Anthony Guidera as the Appointor and Mr Palyga as the settlor. Mr Palyga drafted the trust deed.

In May 2021, Chloe Adolphi Pty Ltd acquired residential property in New South Wales in its capacity as trustee.

No distributions were made to any beneficiary in the 2021 land tax year.

In the trust deed, Chloe Adolphi was named as the "main beneficiary". In addition to Chloe, the persons entitled to benefit from the Trust included all relatives of Chloe and the spouses of those relatives, and corporations and trusts associated with Chloe.

On 23 July 2022, the Chief Commissioner wrote to Chloe Adolphi Pty Ltd advising that it may have incurred a liability to surcharge land tax.

Section 5D of the *Land Tax Act 1956* (NSW) provides that a discretionary trust is deemed a foreign person for surcharge land tax purposes if the terms of the trust deed does not exclude a foreign person from benefiting from the trust. A discretionary trust is taken to have excluded a foreign person if the terms of the exclude a foreign person and the trust is incapable of being amended to allow a foreign person to potentially benefit from the Trust.

On 8 August 2022, Chloe Adolphi Pty Ltd lodged a land tax registration return in which it stated that the Trust was not a foreign person.

On 12 October 2022, the Chief Commissioner assessed Chloe Adolphi Pty Ltd for land tax and surcharge land tax for the 2021 land tax year on the basis that the terms of the trust deed did not explicitly prevent a foreign person from being a beneficiary of the Trust, and the trust was therefore a 'foreign person' for surcharge land tax purposes.

On 14 October 2022, Chloe Adolphi Pty Ltd objected to the assessment.

In December 2022, following the assessment, Chloe Adolphi Pty Ltd, settlor and appointor executed a "deed of rectification", which Anthony, as sole director of Chloe Adolphi Pty Ltd, said gave effect to his intention that no foreign person would be entitled to be a beneficiary of the Trust. Chloe Adolphi Pty Ltd then notified the Chief Commissioner of rectification of the deed.

The Chief Commissioner disallowed the objection on the ground that the deed of rectification did not have a retrospective effect for land tax purposes and at the relevant taxing date, the Trust did not exclude foreign persons from benefiting. Chloe Adolphi Pty Ltd applied to the NCAT for review of the objection decision.

Anthony and the settlor submitted evidence regarding their intentions at the time when the Trust was established. Anthony contended he intended the Trust to solely benefit Chloe but acknowledged the Trust deed did not exclude other beneficiaries. Anthony noted that he had no knowledge of the operation of section 5D of the *Land Tax Act 1956* (NSW) prior to late 2022.

Anthony admitted that he considered making the Trust a fixed trust since the land tax issue arose, but decided against it.

Issue

Did the deed of rectification effectively alter the liability for surcharge land tax?

Decision

The NCAT considered that rectification, either through court order or deed, is a remedy to correct errors or omissions in a legal document. It generally has retrospective effect, meaning the document is treated as if it had been executed in its corrected form. However, rectification cannot correct errors about the legal or factual consequences of a document. A document is not capable of being rectified in circumstances where the parties never considered a matter that has then been brought to their attention subsequently. If there is no actual intention at the time of creation of the document, then there has been no mistake.

Where rectification is effective, it is enforceable against the parties to the deed. However, the NCAT noted that rectification may not affect the rights of third parties if they have accrued based on the original terms of the document. Revenue collectors, such as the Chief Commissioner, are required to assess liability based on the known facts at the time of assessment.

The NCAT found that the overall impression from the evidence provided by Anthony and the settlor was that they were surprised by the assessment of the Trust to surcharge land tax and subsequently took steps to rectify the situation. While it appears that both Anthony and the settlor intended Chloe to be the primary beneficiary, there was also an intention for Chloe Adolphi Pty Ltd to have broad discretion in determining beneficiaries, including natural persons other than Chloe.

The contemporaneous documentary evidence suggests that there was no specific intention to exclude foreign beneficiaries from the Trust, aside from clauses allowing foreign entities to benefit at the trustee's discretion. Therefore, based on the evidence presented, the NCAT concluded that there was no actual intention at the time of settling the Trust to exclude any foreign person from being a beneficiary. As such, the deed was not capable of being 'rectified'.

COMMENT – in this case, the NCAT relied on a case involving a trust disclaimer (*Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd* [2017] NSWCA 184) to conclude that, even if the deed of rectification had been effective, the retrospective effect of the rectification would not have changed the 'taxable facts' that existed at the time of the taxing date for land tax. It is not clear that the approach in the trust disclaimer cases would apply in the case of rectification.

Citation *Chloe Adolphi Pty Ltd as trustee for The Chloe Adolphi Family Trust v Chief Commissioner of State Revenue* [2024] NSWCATAD 48 (Senior Member J Gatland, New South Wales)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/48.html

2.4 Imbree – duty on transfer of property out of super fund

Facts

On 3 April 2002, Paul was badly injured in a car accident leaving him with total C4 tetraplegia.

On 29 November 2004, the Imbree Super Fund was established. Paul and his son, Johnathon, were trustees. Paul was the only member of the Imbree Super Fund.

On 19 December 2009, a contract of sale was executed for the purchase of a property. The purchase price was $2,000,000. The purchasers were Paul and Johnathon in their capacity as trustees of the Imbree Super Fund as to 95/100 shares as tenants in common, with Johnathon as to 5/100 shares in his personal capacity.

On 24 February 2010, the sale was completed, duty of $95,490 was paid, and the Imbree Super Fund recorded the property as an asset in its financial records. The funds used to complete the purchase were sourced from the Imbree Super Fund.

On 28 June 2022, Paul and Johnathon received advice from their accountant that it would be in the "best financial interests of the member and in accordance with risk advice and the implementation of the retirement strategy" that the Property be transferred to Paul in his own right and that legal advice be obtained in respect of transfer duty. There is no evidence that Paul and Johnathon obtained this legal advice.

However, in July 2022, Paul sought a private ruling from the Chief Commissioner as to whether section 57 of the *Duties Act 1997* (NSW) applied to a request from him as a member of the Imbree Super Fund, to the trustees, to transfer to him the 95% share of the property held by the Imbree Super Fund for no consideration, as the provision of retirement benefits.

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On 24 August 2022, and before any private ruling had been issued by the Chief Commissioner, a deed was entered into by Paul and Johnathon as trustees for the Imbree Super Fund, as transferors, and Paul as the transferee. Under the deed, the trustee of the Imbree Super Fund agreed to transfer to Paul, being the sole member of the Imbree Super Fund, the 95% interest in the property.

At this time, the property was valued at $3,475,000. By Clause 1 of the Deed of Transfer, the trustees of the Imbree Super Fund agreed to transfer the property for $3,301,250 payable on settlement, which was to occur within 12 months. In addition, Paul could replace his entitlements in the Imbree Super Fund by transfer of the property to him and therefore not pay any consideration.

There were conditions in the Deed of Transfer including that:

1. the transfer was conditional upon Paul receiving finance within 2 months of signing to complete renovations of the property and obtaining taxation advice as to the effect of the deed and any exemption; and
2. the transfer was conditional upon Paul selling his existing residence in Caringbah South and settling the sale within 12 months.

On 1 September 2022, the Commissioner issued a private ruling finding that the deed did not fall within sections 55 or 65(10) of the Duties Act,

Section 55(1)(b) of the Duties Act provides a concession for the transfer of dutiable property where the dutiable property was vested in the apparent purchaser on trust for the real purchaser who provided the money for the purchase of the dutiable property, or where the purchase money will be provided by the real purchaser.

Section 65(10) of the Duties Act provides an exemption from duty which relate to certain specified instruments, or where the dutiable transaction is effected by such an instrument, if the Chief Commissioner is satisfied that the primary purpose for which the transaction was effected was to comply with legal requirements relating to complying superannuation funds. The 'specific instruments' related to superannuation are listed in section 60 of the Duties Act and include:

1. an instrument that establishes, or that amends provisions governing, a superannuation fund;
2. an instrument under which an employer agrees to participate in or contribute to a complying superannuation fund; or
3. an instrument that is executed in order to set out or vary the terms of custodial arrangements concerning a complying superannuation fund.

On 11 November 2022, the Chief Commissioner issued an assessment to Paul determining that full ad valorem duty was payable on the Deed of Transfer, as it was an agreement to transfer the property, and that Paul was not entitled to a concessional rate of duty.

Paul lodged an objection to that decision and on 22 May 2023, the Commissioner disallowed that objection. Paul applied to NCAT for a review of the assessment.

On 11 October 2023, the Chief Commissioner served his written submissions in the NCAT proceedings. Subsequently, on 12 October 2023, Paul executed a Deed of Variation of Transfer which varied the Deed by changing the settlement date and attached an unsigned transfer document acknowledging receipt by the transferor of $3,301,250 in consideration for the Property. The unsigned transfer indicated that consideration was to be paid.

A second Deed of Variation dated 25 October 2023 was executed and purported to clarify that no consideration is to be paid by Paul for the transfer of the Property to him.

Issues

1. Is Paul entitled to the concessional rate of duty on the Deed under section 55(1)(b) of the Duties Act?
2. Is Paul entitled to the exemption from duty on the Deed under section 65(10)(b) of the Duties Act?

Decision

Section 55

The NCAT stated that the Deed of Transfer does not transfer or vest property, but it is an agreement to do so. Therefore, it is not a 'transfer of dutiable property' under section 8 of the Duties Act. The NCAT stated that the Deed of Variation entered into on 12 October 2023 appeared to have been implemented in an attempt to make good Paul's contention that the Deed of Transfer was a 'transfer of dutiable property', and the transfer was annexed to the Deed of Variation. However, it did not change the NCAT's view that the Deed was not a transfer of dutiable property.

The concession in section 55 only applies to declarations of trusts and transfers of dutiable property. Paul asserted that the Deed of Transfer was a transfer of dutiable property, and not a declaration of trust. Therefore, the NCAT concluded that the Deed of Transfer did not fall within the scope of the section 55 concession available.

For completeness, the NCAT considered Paul's argument that the concession in section 55 is not confined to resulting trust arrangements. That is, whether the Imbree Super Fund was the apparent purchaser and Paul was the real purchaser. The NCAT referred to the case of *Harvey v Chief Commissioner of State Revenue* [2021] NSWCATAD 63 which confirmed that the concession in section 55 only applies to a resulting trust arising from the real purchaser providing the moneys for a purchase in the name of the apparent purchaser.

The NCAT also rejected Paul's submission that he was the real purchaser of the Property. The Property was purchased by the trustees of the Imbree Super Fund. When Paul made the contributions to the Imbree Super Fund, it formed part of the Fund and was no longer Paul's personal property. Further, once acquired using the trust funds, the Property was held by the Imbree Super Fund as an asset of the Fund. The NCAT was not persuaded there was a resulting trust arrangement.

Section 65

The NCAT did not Paul's submission that the Imbree Super Fund Trust Deed was the relevant 'instrument' which effected a dutiable transaction within the meaning of section 65 of the Duties Act. While the Trust Deed for the fund is an 'instrument', tor the concession in section 65(10) to apply, the transaction has to be 'effected' or 'caused' by the instrument. The NCAT referred to section 12 of the Duties Act and stated that the phrase 'effected by such instrument' is intended to focus on the document which brought about the dutiable transaction, being the Deed of Transfer and not the Trust Deed.

The NCAT was not satisfied that section 65(10) of the Duties Act applied.

The NCAT confirmed the duty assessment.

COMMENT – while the ultimate outcome in this case is correct, the reasoning of the NCAT that section 55 of the Duties Act could not apply to the Deed of Transfer as it was an 'agreement for transfer' and not a

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'transfer' seems plainly wrong. It fails to have regard to have regard to section 9(1) of the Duties Act 1997 (NSW), which states "*[t]he duty charged by this Chapter on a dutiable transaction referred to in section 8(1)(b) is to be charged as if each such dutiable transaction were a transfer of dutiable property*". An agreement for the sale or transfer of dutiable property is a dutiable transaction referred to in section 8(1)(b) of the Duties Act. Accordingly, the Deed of Transfer should have been treated as a transfer for the purpose of section 55 of the Duties Act.

TRAP – while there is a specific duty concession in New South Wales for transfers of dutiable property into a superannuation fund, there is no specific duty exemption or concession for transfers of dutiable property out of a superannuation fund.

Citation *Imbree v Chief Commissioner of State Revenue* [2024] NSWCATAD 22 (Senior Member E Bishop SC, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/22.html

2.5 Perrin – reinstatement of a company due to DPN

Facts

Richard Scott Perrin was the sole director, company secretary and shareholder of RSP Group Pty Ltd.

RSP Group was established to be trustee of the Perrin Family Trust. RSP Group was the trading entity for the business involving the assets of the Perrin Family Trust. The business of the Perrin Family Trust ultimately failed.

Following the advice of his accountant, Richard allowed registration requirements of ASIC to lapse and RSP Group was deregistered on 2 May 2021 under section 601AB of the *Corporations Act 2001* (Cth) due to payment or lodgement default.

On 7 February 2024, Richard received two director penalty notices from the ATO for unpaid superannuation guarantee charge amounts and PAYG withholding amounts of RSP Group.

Both DPNs allowed for the penalty in respect of the unpaid amounts of RSP Group to be remitted, if within 21 days, one of the following occurred:

1. the company complied with its obligation to pay the unpaid amount to the Commissioner; or
2. an administrator of the company was appointed under section 436A, 436B, or 436C of the Corporations Act; or
3. a small business restructuring practitioner for the company was appointed under section 453B of that Act; and
4. the company began to be wound up within the meaning of the Corporations Act.

As a liquidator cannot be appointed to wind up a deregistered company, Richard commenced proceedings on 13 February 2024 for an order under section 601AH(2) of the Corporations Act directing that ASIC reinstate the registration of RSP Group on an urgent basis.

Richard gave evidence that he is of the belief that RSP Group was insolvent. If successful in getting an order to reinstate the registration of RSP Group, he intended to take action to place RSP Group in creditors' voluntary liquidation to satisfy the one of the conditions of the DPNs to have the penalties remitted.

The original proceedings were served on ASIC and the Commissioner of Taxation. At the hearing, there was no appearance from ASIC but a legal representative of the ATO attended as an interested party. The Commissioner did not oppose to the reinstatement of RSP Group.

Richard also sought further orders to validate any special resolution or other action relating to RSP Group to implement a creditors' voluntary winding up and the appointment of a liquidator, for the period between the making the of the order and the reinstatement of RSP Group.

Section 601AH(2) of the Corporations Act provides that the Court can order ASIC to reinstate a company where:

1. the application is made by a person aggrieved by the deregistration; and
2. the Court is satisfied that it is just for the company's registration to be reinstated.

Issues

1. Was Richard a person aggrieved by the deregistration of RSP Group?
2. Would it be just for RSP Group's registration to be reinstated?

Decision

Strk J noted the term "person aggrieved" is not expressly defined in the Corporations Act and should not be construed narrowly.

Strk J considered case law and noted that the Richard, being a director, would not necessarily be aggrieved by the non-existence of a company without something more. In determining if Richard was a person aggrieved by the deregistration of RSP Group, he noted that the Court should consider if the deregistration of RSP Group had deprived Richard of something.

Strk J accepted that personal exposure to a penalty faced by Richard as a recipient of a director penalty notice, in circumstances that he was unable to place RSP Group in liquidation by reason of its deregistration, is sufficient ground for Richard to be a person aggrieved by the deregistration of RSP Group.

Strk J considered the term "just" allowed the Court a wide discretion to consider all relevant circumstances, including the circumstances in which the company came to be deregistered, the outcome if an order was made, whether any person was to be prejudiced by the reinstatement, and the public interest generally.

Strk J held that it would be just in this case that RSP Group be reinstated so that a liquidator could be appointed and it placed into a creditors' voluntary liquidation, in circumstances where there was evidence that RSP Group was insolvent when he was deregistered.

Strk J considered the derivative nature of the penalty imposed on Richard for RSP Group's liabilities would suggest that the penalty will only be able to be collected if the liability of RSP Group is recreated through the reinstatement of registration. Therefore, Strk J held that the interests of the Deputy Commissioner of Taxation will not be prejudiced if the reinstatement order is made.

Strk J also noted that there was no apparent prejudice to ASIC by the making of the order. Orders were made for RSP Group to be reinstated.

TIP – the option to have DPN penalties remitted by appointing an insolvency practitioner for the company only applies to DPNs where the relevant disclosure giving rise to the tax or superannuation debt was lodged on

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time (non-lockdown DPNs). For DPNs where the relevant disclosure was not lodged on time (lockdown DPNs), this option is not available.

TRAP – the 21-day timeframe for action on a non-lockdown DPN is strict. If the relevant action is not taken within 21 days, the penalties will not be remitted.

Citation *Perrin v Australian Securities and Investments Commission* [2024] WASC 38 (Strk J, Western Australia)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2024/38.html

2.6 Jensen – disclaimer of interest in deceased estate

Facts

Christopher Jenson, Richard Mlynarik and Anthony Mlynarik are the sons of the late Doris Mlynarik.

From about 1982, Richard has resided in the United State of America.

In 1984, Doris, Christopher and Anthony visited Richard in the US. This visit culminated in an argument between Doris and Richard.

Since 1984, Christopher and Anthony have not seen or heard from Richard.

On 7 March 2019, Doris died. Prior to her death, Christopher made unsuccessful attempts to contact Richard to advise him of Doris' ill health.

On 5 April 2019, Christopher contacted Richard's former spouse by telephone and was informed that she was not in contact with Richard. However, Richard's former spouse provided Christopher with his last known residential address and an email address.

On 4 July 2019, Christopher was granted probate of the Last Will and Testament of Doris dated 28 September 2010. Under the Will, following the payment of expenses, the residue of Doris' estate was to be divided in equal shares as tenants in common among Christopher, Richard and Anthony. The whole of the estate was comprised of cash.

On 2 August 2019, Christopher's solicitors sent a letter by email to the email address advising Richard that he was entitled to a one-third interest in Doris' estate. In the same letter, Richard was requested to provide his best contact details and provide bank details to enable distributions from the estate to Richard. Richard did not respond.

On 12 August 2019, Christopher's solicitors sent a further letter by email to the email address advising that the interim distribution would be $75,000. Richard did not respond.

In or about October 2019, foreign process servers engaged by Christopher's solicitors were able to confirm that the residential address was the last known address of Richard.

On 6 February 2023, Christopher's solicitors sent a further letter by email to the email address which advised that the estimated share of the estate payable to Richard was $291,596.23 and again requested Richard's bank account details. Richard did not respond.

On 28 February 2023, Christopher's solicitors sent a further letter by email to the email address stating that Christopher wished to finalise the administration of the estate. The letter also outlined alternative options available to Richard, including the possibility that he may wish to disclaim the gift to him under the will. Richard did not respond.

Christopher's solicitors then engaged attorneys in California. On 8 March 2023, the attorneys sent a letter by certified mail addressed to Richard at the residential address. The letter was returned undelivered.

On 13 October 2023, foreign process servers engaged by Christopher's solicitors personally served Richard at the residential address with a letter dated 29 September 2023. This letter enclosed the grant of probate and advised Richard of his entitlement under the Will. The letter also advised Richard that if he failed to provide details to enable his share of the estate to be paid to him by 27 October 2023, Christopher would make an application to the Supreme Court of Queensland for an order that Richard's share of the estate be distributed to Christopher and Anthony in equal shares. Richard did not respond.

On 30 November 2023, Richard was personally served at the residential address with sealed copies of the originating application and supporting affidavits, and a notice required by rule 125 of the *Uniform Civil Procedure Rules 1999* (QLD) (**UCPR**).

On 7 December 2023, the application was listed for hearing. The hearing was adjourned because service had not occurred strictly in accordance with the time period imposed by rule 129A of the UCPR.

Following the adjourned hearing, Christopher’s solicitors engaged foreign process servers who, on 15 January 2023, personally served on Richard a copy of the order of the Court made on 7 December 2023 together with a letter from Christopher's solicitors to Richard dated 8 December 2023. The letter dated 8 December 2023 stated that the hearing was listed for 17 January 2024 at which time a declaration would be sought from the Court that Richard had disclaimed the gift provided to him under Doris' Will. A further order would be sought directing Christopher, as executor, to distribute Richard's gift to Christoper and Anthony equally. Richard did not respond.

On 17 January 2024, Christopher's application was heard by the Supreme Court of Brisbane. Richard did not appear at the hearing.

Issues

Did Richard's continuing failure to respond to communication amount to a disclaimer of his gift under the Will?

Decision

The Court referred to general legal principles regarding the disclaimer of gift. Namely, a disclaimer of a gift involves the refusal to accept the interest, and the disclaimer must be made with knowledge of the gift and the intention to disclaim it. Until a gift is disclaimed, the law presumes that the donee assents to the gift.

The Court cited an academic paper which referred to there being "no generally applicable form of disclaimer required by law", and that it can be made by any means and rejects ownership of the gift. That is, it is the substance of the disclaimer which is relevant, not its form.

The Court accepted that Richard had been provided with clear notice of the gift and its amount, and that Richard had not engaged in any conduct which could constitute assent to the gift.

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However, the main issue for consideration by the Court was whether Richard's continued failure from 13 October 2023 to take any action or steps in respect of the gift constituted a clear and decisive refusal to accept his gift under the Will.

The Court determined that, from 13 October 2023, Richard was not only aware of the amount of the gift made to him under the Will but also that there were no conditions attaching to the gift and the gift could be paid to him immediately.

Further, Richard made no contact with Christopher's solicitors to claim the gift. The Court accepted that Richard acted in that manner with knowledge that his failure to make contact was to be relied upon as a basis for a submission to this Court that, by inference, he had disclaimed the gift.

The Court found that Richard's conduct, engaged in with knowledge of the gift and how the conduct would be interpreted and relied upon, amounted to a peremptory, dogmatic refusal of the gift.

The Court held that Richard had disclaimed the gift made to him under the Will.

COMMENT – the tax question that arises out of this case is, assuming the Executor intended to make in-specie distributions of CGT assets of the deceased to the beneficiaries of the Estate, what is the impact of Richard’s disclaimer in applying CGT and duty concessions for distribution of estate assets? Is the effect of the disclaimer that Christopher and Anthony are always treated as having been entitled to the residue of the Estate as to 50% each? This likely depends upon the drafting of the will and the succession law of the relevant State. For example, section 139 of the *Succession Act 2006* (NSW) provides, in the case of an intestate estate, that a person disclaiming an interest is treated as if they predeceased the deceased.

Citation *Jensen v Mlynarik* [2024] QSC 19 (Kelly J, Brisbane)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QSC/2024/19.html

2.7 Daire v Haley – beneficial owner of property

Facts

In or around 1996, Thomas Hayley was made bankrupt.

In 1997, Kimberley Daire and Nikki Daire, Thomas' daughters, changed their surname to their mother's maiden name, due to the difficult relationship between themselves and Thomas.

In August 2001, Thomas exchanged contracts to purchase a property at Moama for $28,000, paying $8,200 as the deposit for the property.

In January 2002 the sale completed by way of vendor finance, and subsequently secured by a registered mortgage. Thomas executed all documents in the previous names of his daughters, forged their signatures on the documents and caused the title to be registered in their names. At no time during the purchase was either daughter aware that such a transaction was taking place. Thomas had not had any contact with either of his daughters for a number of years by reason of court orders.

In February 2002, Thomas was discharged from bankruptcy.

By 2007, Thomas had paid of the whole mortgage debt, but did not discharge the mortgage. For some time, Thomas paid the rates owing on the property. Thomas had sole use and occupancy of the property.

In or around 2013, Nikki became aware of her interest in the property. Nikki was informed by another family member on behalf on Thomas via text message. Subsequent messages sent by the family member promised that the certificate of title would be sent to Nikki, which was later completed by Thomas himself some months later. They also included that now they knew of the property, it was up to them to decide what to do with it.

In August 2013, Thomas informed Nikki that there was approximately $18,000 of rates owing against the property. Nikki informed Thomas that "we are happy to sell it". It is unclear whom "we" references.

In or around 2016, Kimberely became aware of her interest in the property.

In 2018, Thomas' solicitor sent an email to Nikki relevantly detailing that Thomas had purchased the property in the names of Nikki and Kimberley as a means of leaving something for both of them that would be protected against a claim against his estate if he were to die prematurely.

In 2020, Nikki became aware that there was $12,000 in rates owing, $11,000 of which was overdue. Nikki and Kimberley paid the rates owing.

Later in 2020, Thomas sent Kimberley an email stating that she and Nikki 'had the legal right to sell the [property]'.

In January of 2021 Kimberley and Nikki applied to the NSW Land Registry Service to obtain a replacement certificate of title on the basis that Thomas had stolen it.

In July 2021, Thomas lodged a caveat against the property asserting that he had a 'beneficial Interest In Trust', because he had purchased the properties in his daughters' names, but was to remain the effective owner, such that they would own it on trust for him.

In 2022, Kimberley and Nikki attempted to sell the property, but were unable to due to the caveat lodged by Thomas the year prior. Kimberley and Nikki then commenced proceedings in the Supreme Court of New South Wales to withdraw the caveat.

Nikki and Kimberley submitted that because Thomas had the title registered in their names at the time of purchase, he intended to gift the property to them. Kimberley and Nikki also submitted that Thomas is unable to claim that he did not gift the property as his illegal acts, in not disclosing the property to his trustee in bankruptcy and committing fraud in using their signatures, disqualifies any claim he might have.

Thomas submitted that he did not intend to gift the property for the following reasons:

1. he advanced the deposit and contributed the funds for the entire mortgage repayment;
2. that he knew that Kimberely and Nikki had changed their names and intentionally did not use their legal names;
3. that he could only secure vendor finance if the property was not in his name due to his bankruptcy; and
4. he did not inform Kimberley and Nikki of the purchase for more than 10 years after it completed.

Issue

Did Thomas purchase the property to gift to Kimberley and Nikki?

Decision

Peden J began by discussing how to determine whether a gift is intended when a property is purchased in the name of someone else. He first discussed that when someone purchases a property and transfers the title to

another person, a presumption arises that it was not a gift, and that the purchaser retains an interest in the property. The person who holds the title holds the title on trust for the purchaser. This presumption, however, is countered by another presumption, where such a purchase is made in the course of specific types of relationships. Relevantly, there is a counter-presumption that arises where a father purchases property for his children, transaction is presumed to be a gift.

Both presumptions can be rebutted by looking at the actual intention present at the time that the property was purchased.

Peden J did not conclude that Thomas had purchased the property deliberately to defeat creditors in a way that would be a breach of the bankruptcy laws, and therefore be illegal. There was not sufficient evidence before the Court to draw that conclusion. Therefore, the illegal actions (including forgery) were not sufficient to necessarily deprive Thomas of any interest from a trust, if a trust existed.

However, Peden J noted that in his communications with Kimberley and Nikki, both directly from himself and through others, Thomas unambiguously states that they are the legal owners of the property and they had the right to sell it and keep the proceeds. This is inconsistent with an intention to create a trust relationship.

Peden J detailed that the use of the previous names of Kimberely and Nikki did not show that he did not intend to give a gift, as he blatantly refused to acknowledge their changes of name entirely and all his correspondence referred to them by their birth names.

Peden J concluded that the intention at the time of the purchase was that the property would be a gift for Kimberley and Nikki.

COMMENT – questions of beneficial ownership of property often arise in practice. The fact that a person is beneficially entitled to a CGT asset will not necessarily be sufficient for that person to be treated as the taxpayer in relation to that CGT asset to the exclusion of the trustee. It likely will be the case that the beneficiary will need to be 'absolutely entitled' to the CGT asset as against the trustee: see section 106-50 of the ITAA 1997. The ATO's views on the meaning of 'absolute entitlement' are set out in *Draft Taxation* 2004/D25. Importantly, in the context of this case, the ATO considers that more than one person cannot be absolutely entitled to non-fungible assets as against the trustee.

Citation *Daire v Hayley (No 2)* [2024] NSWSC 161 (Peden J, Sydney)
w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/161.html

2.8 McGregor – beneficial owner of property

Facts

On 17 December 2001 Barry McGregor purchased a property in Guyra, New South Wales for $18,000. Prior to the beginning of the purchasing process, Barry told his son, Whatarangi Rogers, that the property would make a good investment property for him and that he would register Whatarangi as the proprietor. Whatarangi transferred to Barry several sums of money for the purpose of contributing to the purchase of the property. Barry registered himself as the sole proprietor of the Guyra property. The property was purchased unencumbered by a mortgage.

In December 2002, Barry was arrested for the murder of his then partner, for which he was later convicted and sentenced to imprisonment of 20 years. A general power of attorney was executed in favour of Whatarangi.

The power of attorney allowed for Whatarangi to exercise lawfully on his authority anything that may confer a benefit on Whatarangi.

In 2004, Whatarangi was informed that the title of the Guyra property was not in his name, and confronted Barry about it, while Barry was still in prison.

During the time that Barry was imprisoned, the rates of the Guyra property fell into arrears. Barry had appointed a friend, Janet Parkinson, to pay the rates on his behalf. Barry received an insurance payout of $17,000, which he submitted that he would use to pay back the loan to Whatarangi. Barry instead paid the rates arrears.

On 15 September 2011, Whatarangi effected a transfer of title of the property to his name, with the assistance of a solicitor. Whatarangi used the powers conferred on him by the power of attorney to sign a memorandum of transfer. The memorandum of transfer recorded Whatarangi's "receipt" of consideration of $36,000. Following the successful transfer of title, Whatarangi began paying the rates for the property.

In December 2011, Barry lodged a caveat against the title to the Guyra property on the basis that he was the rightful legal owner because Whatarangi transferred the title outside of his authority under the power of attorney.

In December 2018 Barry was released from prison. In 2022 he applied to the Supreme Court of New South Wales to have the ownership of the Guyra property transferred back into his name.

Whatarangi said that he transferred sums totalling $36,000 to Barry around the time Barry purchased the property.

Barry said that Whatarangi transferred approximately $15,000 to Barry so that Barry could cover the purchase price of $18,000. Barry also argued that the sum was transferred was a loan for the purchase of the property.

Barry had no funds of his own to purchase the property. At the time that Barry was purchasing the Guyra property, he was also involved in discussions to sell one of his properties. Barry borrowed the money from the purchasers of that property to fund the deposit for the Guyra property.

Barry denied that he ever received $36,000 from Whatarangi.

Barry applied to the Supreme Court of NSW for a declaration that Whatarangi holds the Guyra property on trust for Barry, and that Whatarangi should transfer the property to Barry.

In response, Whatarangi asked the Court to make one of the following declarations:

1. Whatarangi is absolutely entitled to the property; or
2. Whatarangi has beneficial ownership of 83.33% of the property (representing $15,000 as a percentage of $18,000); and
3. Barry pay Whatarangi $15,000 plus interest.

Whatarangi also requested that the Court order Barry to withdraw his caveat over the property.

Issue

Was Barry the rightful legal owner of the Guyra property?

Decision

Lindsay J noted that the evidence from both Barry and Whatarangi was inconsistent. Lindsay J was inclined to accept Whatarangi's evidence on the basis that it was more consistent than Barry's evidence.

Whatarangi gave Barry the money based on a representation made to him by Barry that the property was to be purchased as Whatarangi's "first investment". Coupled with Barry's lack of attempts to pay back the money he received from Whatarangi, it indicated that Barry very likely did not receive the money as a loan.

Barry argued that Whatarangi's lack of interest in the purchase, aside from the transfer of funds, showed that Barry received the money as a loan. Lindsay J held that the level of interest that Whatarangi showed in the process of the purchase of property does not affect his claim to the title.

Lindsay J concluded that for the time that Barry was the registered proprietor of the property he held it on trust for Whatarangi. Therefore, Whatarangi was the beneficial owner of the Guyra property and was entitled to transfer title into his name. Lindsay J also ordered that Barry had no right to hold a caveat over the property and that the caveat should be withdrawn.

Citation *McGregor v Rogers* [2024] NSWSC 121 (Lindsay J, Sydney) w https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/121.html

2.9 Other tax and superannuation related cases in period of 8 Feb 2024 to 7 March 2024

Citation	Date	Headnote	Link
Re AUSCOAL Superannuation Pty Ltd atf the Mine Superannuation Fund; Application for Judicial Advice [2024] NSWSC 32	1 February 2024	EQUITY – trusts and trustees – judicial advice under s 63 of the Trustee Act 1925 (NSW) – where superannuation fund comprises members with accumulation interests and members with defined benefit interests – where trust deed of the fund contains a “single trust” clause – where the “single trust” clause provides that no part of the trust deed shall be taken as establishing a separate trust in respect of any category of members or any part of the fund – whether the trustee would be justified in administering and managing the fund on the basis that, notwithstanding the presence of the “single trust” clause, in all the circumstances the entitlements of members with defined benefit interests must be satisfied out of the net value of the assets attributed by the fund to the category or division within the category to which members with defined benefit interests belong – consideration of the construction and effect of the “single trust” clause in the context of the trust deed as a whole – whether the trustee of the fund may make certain amendments to the trust deed to empower the board of directors of the fund to retain the services of and appoint expert advisors and consultants, and to act on their advice – whether the trustee of the fund may amend the trust deed to confirm that the existing indemnity under the deed extends to circumstances where the trustee acts upon the opinion or advice of expert advisors and consultants	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/32.html

Citation	Date	Headnote	Link
Commissioner of Taxation v Iannuzzi (No 3) [2024] FCA 45	2 February 2024	CORPORATIONS – applications to discharge or vary orders which reinstated the registration of deregistered companies pursuant to s 601AH(2) of the Corporations Act 2001 (Cth) – where order was made pursuant to s 601AH(3)(d) of the Corporations Act to disregard the period between the date of the relevant companies' deregistration and the date of the order for the purpose of calculating the period ending three years after the relation-back day (Order 3) – where order was made granting the companies liberty to apply to vary or discharge Order 3 – where Order 3 was made by consent without notice – where the three year limitation period under s 588FF(3) of the Corporations Act had expired at the time Order 3 was made – whether the Court has power to make Order 3 other than by s 588FF(3) of the Corporations Act – whether Order 3 should be set aside as of right – whether s 601AH(3)(d) of the Corporations Act may be used to augment the reckoning of time for limitation purposes – whether s 601AH(3)(d) or alternatively s 536 (now repealed) of the Corporations Act empower the Court to make an order extending time (or suspending time) for the purposes of s 588FF(1) of the Corporations Act – applications granted	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/45.html
Chang v Tjiong (No 2) [2024] NSWSC 74	9 February 2024	EQUITY – Trusts and trustees – Express trusts – Reconstituting trust fund – Determining corpus of trust – tracing – where trust funds used to buy real property which was later sold – whether trust funds should be traced into sale proceeds and how far – whether trust funds should include figure for notional rent – whether income taxation should be deducted from trust funds EQUITY – Trusts and trustees – Trustee's indemnity for expenses properly incurred in administration of trust – indemnity to be deducted from corpus of reconstituted trust – whether claimed expenses were in connection with administration of trust – where trustee denied existence of trust at the time some expenses incurred	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/74.html
The Counsellor and Commissioner of Taxation (Taxation) [2024] AATA 220	13 February 2024	TAXATION – income tax default assessments due to non-lodgement of income tax returns – whether the taxpayer discharged onus of proof in showing nil taxable income in relevant income years – no agreement to limit issues in dispute except agreed prior year losses to be carried forward – whether payments to taxpayer or for taxpayer's personal expenses by taxpayer's company properly characterised as repayments of loans made by taxpayer to company – whether loans made by company to taxpayer – whether loans made by taxpayer's brother to taxpayer – provenance of amounts – intermingling of taxpayer's funds with those of the company - failure to adduce reliable evidence – credibility of taxpayer and brother – whether administrative penalties correctly imposed for failure to lodge tax returns – objection decision affirmed – objection to shortfall interest charges dismissed for want of jurisdiction as no shortfall interest charges imposed	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2024/220.html

Citation	Date	Headnote	Link
Gumm v Commissioner of Taxation [2024] FCA 71	14 February 2024	PRACTICE AND PROCEDURE – security for costs – application brought in context of taxation appeal under Part IVC of the Taxation Administration Act 1953 (Cth) – where application brought against individual ordinarily resident overseas – where individual holds no substantial assets in jurisdiction – where there is a risk that individual will not satisfy an order for costs – where there are some defensive elements to the proceedings – where no risk that proceedings will be stifled if an order for security is made – security for costs ordered	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/71.html
Esso Australia Resources Pty Ltd v Commissioner of Taxation [2024] FCA 87	16 February 2024	TAXATION – petroleum resource rent tax – payments under Gas Processing Agreement – monthly reservation fees – settlement sum – assessable petroleum receipts – assessable tolling receipts – assessable property receipts – derivation	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2024/87.html
Continuum Recruitment Pty Ltd v Chief Commissioner of State Revenue [2024] NSWCATAD 38	16 February 2024	TAXES AND DUTIES – payroll tax – penalty remission	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAD/2024/38.html
Ferella as Executor of the Estate of the late Gustavo Ferella v Chief Commissioner of State Revenue [2024] NSWSC 166	28 February 2024	TAXES AND DUTIES — land tax — liability — exemptions — exemption for land used for primary production — appeal under s 83(1) of the Civil and Administrative Tribunal Act 2013 (NSW) — whether dominant use of land for maintenance of animals for purpose of selling them or their natural increase or bodily produce — when no other use of property put to Tribunal — relevance of subjective intention of taxpayer — no evidence of subjective intention	http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2024/166.html
Feng v Chief Commissioner of State Revenue [2024] NSWCATAD 56	29 February 2024	TAXES AND DUTIES – Land tax – Surcharge land tax – Foreign person – Liability TAXES AND DUTIES – Land tax – Surcharge land tax – Exemptions – Principal place of residence	https://www.caselaw.nsw.gov.au/decision/18dee2fa55e426a90aa10328
Stern v Commissioner of Taxation [2024] FCAFC 21	1 March 2024	SUPERANNUATION – Div 294 of the Income Tax Assessment Act 1997 (Cth) – whether defined benefit lifetime pension excluded from calculation of excess transfer balance – reliance on Guide in determining purpose or object underlying operative provisions – contended purpose not supported by statutory text – s 294-140 neither ambiguous nor manifestly absurd or unreasonable – held: s 294-140 should be construed in accordance with words in fact used STATUTORY CONSTRUCTION - whether s 294-140 of the Income Tax Assessment Act 1997 (Cth) means what it says or should be construed in accordance with a contended purpose not evident from the statutory language used – held: s 294-140 means what it says	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/21.html
Commissioner of Taxation v Hannover Life Re of Australasia Ltd [2024] FCAFC 23	4 March 2024	TAXATION – goods and services tax – input tax credits – creditable acquisitions – creditable purpose – whether life insurer is entitled to input tax credits under the A New Tax System (Goods and Services Tax) Act 1999 (Cth) for acquisition of “overheads” – where life insurer made both input taxed supplies and GST-free supplies of reinsurance – whether overheads related to all supplies – fair and reasonable method of calculating extent of creditable purpose	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2024/23.html

3. Federal Legislation

3.1 Progress of legislation

Title	Introduced House	Passed House	Introduced Senate	Passed Senate	Assented
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2024	22/06	09/08	09/08		
Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2024	13/09	27/11	27/11		
Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023	16/11				
Superannuation (Objective) Bill 2023	16/11				
Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023	30/11				
Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023	30/11				
Administrative Review Tribunal Bill 2023	07/12				
Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Bill 2023	07/12				
Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024	06/02	15/02	26/02	27/02	05/03
Treasury Laws Amendment (Cost of Living—Medicare Levy) Bill 2024	06/02	15/02	26/02	27/02	05/03
Treasury Laws Amendment (Foreign Investment) Bill 2024	07/02	14/02	26/02	2	
Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024	07/02	14/02	26/02		

3.2 Stage three tax cuts passed

On 27 February 2024, the Commonwealth Government passed the *Treasury Laws Amendment (Cost of Living Tax Cuts) Bill 2024* has been passed.

The amendments modify the tax rate thresholds and tax rates for both tax residents and non-tax residents of Australia for 2024-25 and later income years.

Following the amendments, the tax rates for resident individual taxpayers are as follows:

Income	Tax rate
Up to $18,200	Nil

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$18,201 to $45,000	16%
$45,001 to $135,000	30%
$135,001 to $190,000	37%
More than $190,000	45%

The rates of tax for non-resident individual taxpayers and individuals on working holiday visas have also changed.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7140

3.3 Increase to Medicare levy low-income thresholds for individuals and families

On 27 February 2024, the Commonwealth Government passed the *Treasury Laws Amendment (Cost of Living—Medicare Levy) Bill 2024* (**Medicare Bill**). The Medicare Bill amends the *Medicare Levy Act 1986* and the *A New Tax System (Medicare Levy Surcharge — Fringe Benefits) Act 1999* to increase the Medicare levy low-income thresholds for individuals and families and surcharge threshold in line with movements in the CPI.

	Previous threshold (to 30 June 2023)	***New threshold (from 1 July 2023)***
Singles	$24,276	$26,000
Family	$40,939	$43,846
Singles (seniors and pensioners)	$38,365	$41,089
Family (seniors and pensioners)	$53,406	$57,198
Increase to family income threshold for each dependent child or student	$3,760	$4,027

No Medicare levy is payable where a taxpayer has a taxable income at or below the applicable threshold amount.

Medicare levy applies at a reduced rate to taxpayers with taxable incomes above the threshold amount but not more than the 'phase-in limit' The Medicare levy phase-in limits for the 2024 income year have increased as follows:

	Previous phase-in limit (to 30 June 2023)	***New phase-in limit (from 1 July 2023)***
Singles	$30,345	$32,500
Family	$51,173	$54,807
Singles (seniors and pensioners)	$47,956	$51,361
Family (seniors and pensioners)	$66,757	$71,497

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The Medicare levy surcharge low-income thresholds for the 2024 income year have also increased for individuals from $24,276 to $26,000 in respect of the surcharge payable on taxable income for a person who is married (or both married and a beneficiary of a trust) and surcharge on reportable fringe benefits.

Schedule 1 to the Medicare Bill commenced on 6 March 2024 (the day after the Act received Royal Assent).

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7141

3.4 Amendments to foreign investment rules to boost housing stock

The *Treasury Laws Amendment (Foreign Investment) Bill 2024* introduces several measures to boost Australia's housing stock and to enhance the integrity of Australia's foreign investment rules.

These are broadly:

1. amendments to Schedule 1 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) to update the fee cap to increase the maximum fee that can be imposed by the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020*, including amending the relevant indexation provisions, enable the tripling of fees for acquiring established residential dwellings and the doubling of vacancy fees in the foreign investment framework;
2. amendments to Schedule 2 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) to triple the fees for giving notice in relation to the acquisition of established dwellings and double the vacancy fees for established and new residential dwelling that have been acquired on or after 7.30pm on 9 May 2017;
3. amendments to Schedule 2 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) to update the relevant indexation provisions to be consistent with the changes applied in Schedule 1 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015*(Cth);
4. amendments to the *International Tax Agreements Act 1953* (Cth) to ensure that there is clarity surrounding the interaction between taxes, such as foreign investment fees and similar state and territory property taxes and double tax agreements implemented domestically by the International Tax Agreements Act 1953. The amendments aim to ensure that such taxes prevail in the event of any inconsistency with the International Tax Agreements Act 1953.

The Treasury Laws Amendment (Foreign Investment) Bill 2024 applies to taxes (not including income taxes and fringe benefits taxes) payable on or after 1 January 2018 and taxes (not including income taxes and fringe benefits taxes) payable in relation to tax periods that end on or after 1 January 2018.

COMMENT - It is unclear what will happen to taxpayers from India, Finland, Germany, Japan, New Zealand, Norway, South Africa and Switzerland who paid surcharge purchaser duty or surcharge land tax in New South Wales and later received refunds when Revenue NSW announced that the surcharges were inconsistent with the double taxation agreements (**DTAs**) for those countries. The change in relation to the *International Tax Agreements Act 1953* will apply retrospectively from 1 July 2018, so that our DTAs will not have applied to FIRB fees and state and territory property taxes from that time.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7142

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3.5 Increases to maximum fees imposed on foreign acquisitions of land

On 7 February 2024, the Commonwealth Government introduced the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024* to the House of Representatives, following changes to foreign investment fees being announced in the 2023-24 Mid-Year and Economic Fiscal Outlook.

The Bill updates the fee cap, which is the maximum fee that can be imposed by the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020*.

Schedule 1 to the Bill will amend the indexation provisions that apply to the fee cap. The proposed amendments will also triple the fees for acquiring established residential dwellings and double the vacancy fees in the foreign investment framework.

Schedule 2 to the Bill will amend the regulations to triple the fees for giving notice in relation to the acquisition of established dwellings and double the vacancy fees for all foreign-owned established and new residential dwellings acquired on or after 7.30pm on 9 May 2017. The relevant indexation provisions will also be updated.

The Bill will commence on the later of 1 April 2024 and the day after it receives royal assent.

w https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7139

3.6 PAYG variation for one-off donations to DGRs through workplace giving

On 6 February 2024, the *Taxation Administration (Withholding for Occasional Payroll Donations to Deductible Gift Recipients) Legislation Instrument 2024* was registered as a legislative instrument.

There is another legislative instrument (Variation 45) that applies to allow a payer to reduce a PAYG withholding payment by the amount the payer pays to a deductible gift recipient on a payee's behalf. This is intended to make workplace giving programs more attractive, by enabling the participant to receive the benefit of the tax deductibility of their gift at the time of the donation, rather than wait until their annual income tax assessment.

Following the 2009 Victorian bushfires, there was increased demand for a withholding variation arrangement for occasional or one-off donations, rather than regular giving.

This legislative instrument is intended to continue to provide a simple withholding variation mechanism for a payer, such as an employer, who, at the direction of the payee, such as an employee, makes donations to deductible gift recipients under occasional giving arrangements.

Section 6 of the legislative instrument sets out a process to determine the amount that a payer must withhold from a withholding payment to the payee.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI20241/00001

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3.7 Additional method for monthly payers of PAYG instalments

The Commissioner has made Legislative instrument LI 2024/3, which is the *Taxation Administration (Additional Method for Working Out the Amount of Monthly Instalment Liabilities) Determination 2024*. This determination renews an earlier determination from 2013 which was due to lapse in April 2024.

The determination provides an alternative method for working out PAYG instalments for monthly payers and sets out when monthly payers can elect to use this method, instead of the statutory method.

To use this additional method:

1. the entity must be a monthly payer at the end of the first instalment month of an instalment quarter;
2. if a monthly payer decides to use the additional method for the first month of an instalment quarter, it must use the same method for each of the remaining months of that instalment quarter; and
3. if a monthly paper decides not to use the additional method for the first month of an instalment quarter, then they cannot use that method for any month in that instalment quarter and must use the statutory method instead.

The additional method is:

1. to work out their monthly instalment for the first and second instalment months of an instalment quarter, the monthly payer must multiply a reasonable estimate of their instalment income for the relevant month by the applicable instalment rate (which is defined in subsection 45-114(2) in Schedule 1 to the Act);
2. to work out their monthly instalment for the third instalment month of the instalment quarter, a monthly payer must calculate their actual instalment income for the quarter, subtract the estimated instalment income used in calculating their instalments for the first and second months of that quarter, and then multiply the result by the applicable instalment rate; and
3. if the amount of the instalment that is worked out for the third instalment month of the instalment quarter is less than zero, the instalment income for that month is taken to be zero; in these circumstances the monthly payer can revise their instalment income for the previous instalment months of that instalment quarter in the approved form, starting with the second instalment month.

Monthly payers cannot apply for a refund if they determine they have overstated their instalment income in the first or second month of that instalment quarter. They will instead need to revise their instalment income on a "last-in first-out" basis to reduce their instalment for the applicable month. In order to do this, monthly payers should submit a revised activity statement.

The Commissioner has the power to notify a monthly payer that they are required to use the statutory method.

w https://www.ato.gov.au/law/view/document?docid=OPS/LI20243/00001

3.8 Minister specifies government entities excluded from being charities

Subsection 4(2) of the *Charities Act 2013* provides that the Minister may, by legislative instrument, prescribe a kind of government entity for the purposes of paragraph (b) of the definition of 'government entity' in subsection 4(1) of the Charities Act.

A government entity is specifically excluded from the definition of charity under the Act for the purposes of all Commonwealth laws.

A legislative instrument has been made in accordance with this power to prescribe certain entities established under a law by a State or Territory as government entities, if:

1. it is a local governing body;
2. it has all the privileges and immunities of the Crown (in any of its capacities); or
3. in pursuing its objectives, the entity is not independent of the Crown, having regards to the degree of control by government and the functions and responsibilities that it was set up to carry out.

The instrument will replace the *Charities (Definition of Government Entity) Instrument 2013* which was to sunset on 1 April 2024.

w https://www.legislation.gov.au/F2024L00137

3.9 Data Matching Program – novated leases and rental bonds

The ATO will acquire rental bond data from State and Territory rental bond regulators bi-annually from the income year ended 30 June 2024 to the income year ended 30 June 2026.

The ATO will also acquire novated lease data from McMillan Shakespeare Group, Smartgroup Corporation, SG Fleet Group, Eclipx Group, LeasePlan, Toyota Fleet Management, LeasePLUS and Orix Australia for the income year ended 30 June 2024 through to the income year ended 30 June 2026.

The objectives of the data collection programs include promoting voluntary compliance and increasing community confidence in the integrity of the tax and superannuation systems.

w https://www.legislation.gov.au/C2024G00132/asmade/text
w https://www.legislation.gov.au/C2024G00139/asmade/text

4. State Legislation

4.1 Tasmania – short-stay rental fee and abolition of stamp duty for first home buyers

The Tasmanian Government has announced, as part of its '2030 Strong Plan for Tasmania's Future', a stamp duty policy aimed at helping young Tasmanians buy their first home. The policy will:

1. abolish stamp duty for eligible Tasmanians buying their first home, which may be an existing house, unit or apartment, valued up to $750,000;
2. begin immediately and will be open for two years until 20 June 2026, at which time it will be reviewed; and
3. be funded by the short stay levy paid by interstate and overseas travellers.

The short stay levy is expected to raise $11 million a year, equating to around $44 million over four years. The stamp duty policy is expected to cost $64.3 million over two years, meaning an estimated net policy cost to the budget of $20.3 million.

w https://tas.liberal.org.au/news/2024/02/18/strong-plan-stamp-out-stamp-duty-first-home-buyers

4.2 Western Australia – residential construction land tax exemption

On 27 February 2024, the Western Australian Government introduced the Land Tax Assessment Amendment (Residential Construction Exemptions) Bill 2023 to the Legislative Council. The Bill seeks to amend the *Land Tax Assessment Act 2002* to temporarily extend the residential construction exemptions from land tax for owners who commenced construction between 1 July 2020 and 30 June 2023. The Bill provides for:

1. a 3-year exemption for newly constructed or refurbished homes. This exemption can be extended to 4 years in exceptional circumstances, such as delays caused by a builder going into liquidation; and
2. a 2-year exemption for a new home that is being built or refurbished while the owner lives in their existing home. This exemption can be extended to 3 years in exceptional circumstances, such as delays caused by building material or labour shortages.

The amendments set out in the Bill will not commence retrospectively but will apply from the day after the Bill receives Royal Assent.

w
https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=FE2E8603DC49364148258A75000A1AE1

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5. Rulings

5.1 Deductibility of self-education expenses incurred by an individual

On 27 September 2023, the ATO published Taxation Ruling TR 2024/3 which set out the principles on the deductibility of self-education expenses. This Ruling finalises draft Taxation Ruling TR 2023/D1 (see our October 2023 tax training notes).

The finalised Ruling has included a new Example 15 which is as follows:

> *Example 15 – self-education expenses to get new income-earning activity not deductible; self-education expenses later incurred with connection to income-earning activities deductible*
>
> *69. Tommy is a part-time nursing student. He supports himself by driving taxis. Having completed sufficient modules to be able to work as an enrolled nurse, Tommy applies for a part-time job as an enrolled nurse and is successful.*
>
> *70. Tommy cannot claim the nursing study expenses he incurs while earning income as a taxi driver. This includes course fees he pays before he starts working as a nurse, even if the fees cover modules that he has not yet completed.*
>
> *71. However, now he is working as an enrolled nurse on a part-time basis, Tommy can claim the self-education expenses he incurs after he commenced working as an enrolled nurse.*

The Ruling is now finalised and is in effect from 27 September 2023.

ATO reference *Taxation Ruling* TR 2024/3
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20243/NAT/ATO/00001

5.2 Corporate limited partnership 'credits' to a partner in that partnership

On 21 February 2024, the Commissioner released *Taxation Ruling* TR 2024/2.

Corporate limited partnerships are taxed as companies. Under section 94M of the ITAA 1936, when an amount is paid or credited by a corporate limited partnership to a partner, it will be a dividend paid out of profits if it is paid or credited against the profits or anticipated profits of the partnership or otherwise in anticipation of the profits of the partnership. The term ‘credited’ is not defined in the legislation.

The Ruling clarifies that 'credits' in section 94M of the ITAA 1936 does not mean 'pays' or 'distributes' and requires more than a mere credit entry in the corporate limited partnership's accounts.

The Ruling confirms that a corporate limited partnership ‘credits’ an amount to a partner if it applies or appropriates its resources to confer a benefit on the partner that is legally enforceable, not subject to a condition precedent, and is separate from the partner's existing interest in the corporate limited partnership and its assets. Mere credit entries in the corporate limited partnership's accounts are insufficient unless they represent an underlying act or transaction meeting these criteria.

The Ruling outlines a three-step process for determining whether a crediting has occurred, involving:

1. assessing whether the corporate limited partnership has conferred a benefit;
2. whether the benefit is legally enforceable; and
3. whether it is separate from the partner's existing interests.

It emphasises that partners can be credited without actual distributions or payments, and even if a future event may require the benefit to be relinquished.

ATO reference *Taxation Ruling* TR 2024/2
w https://www.ato.gov.au/law/view/document?docid=TXR/TR20242/NAT/ATO/00001

5.3 Time limits for claiming an input tax or fuel tax credit

On 21 February 2024, the Commissioner released draft *Miscellaneous Taxation Ruling* MT 2024/D1. The draft ruling outlines the Commissioner's views on the time limits for the entitlement to an input tax credit or fuel tax credit under specific sections of the GST Act and the Fuel Tax Act. Specifically, it addresses subsection 93-5(1) of the GST Act and subsection 47-5(1) of the Fuel Tax Act, which both set out the timeframe within which taxpayers can claim these credits. This draft ruling aims to provide clarity on the applicable timeframes for claiming input tax credits and fuel tax credits under the respective legislation.

The draft ruling is opened for comments until 22 March 2024.

Under subsection 93-5(1) of the GST Act and subsection 47-5(1) of the Fuel Tax Act, entitlement to a tax credit ceases if it has not been considered in an assessment within the 4-year entitlement period, except in certain circumstances.

The draft ruling addresses the following issues:

1. when and the extent to which a tax credit has been taken into account in an assessment;
2. when the 4-year entitlement period ends;
3. the role of objections in preserving entitlements to tax credits; and
4. the interaction between the limiting provisions and requests for private rulings and amendments.

The Ruling cites key decisions from courts and tribunals, such as *Linfox Australia Pty Ltd v Commissioner of Taxation* [2019] FCAFC 131 and *Coles Supermarkets Australia Pty Ltd v Commissioner of Taxation* [2019] FCA 1582, to clarify the interpretation of "taken into account in an assessment." The ruling notes that the 4-year entitlement period is rigid, with entitlements ceasing if BAS lodgment extensions are not granted within the stipulated timeframe.

'Taken into account' in an assessment

A tax credit is considered "taken into account" in an assessment if it forms part of the calculation that produces the assessed net amount or assessed net fuel amount for the relevant tax period or fuel tax return period. This means that the amount of the tax credit included in the calculation determines whether it has been taken into account. If the full amount is not included in the calculation, only the included portion is considered taken into account.

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4-year entitlement period

The 4-year entitlement period starts from the day you were required to file a return for the tax period or fuel tax return period to which the credit is attributable. Extensions to this period are only granted by the Commissioner before its expiry, and once the period ends, entitlement to the tax credit immediately ceases.

Objections, requests for amendment, and ruling requests

Lodging an objection, requesting an amendment, or seeking a private ruling does not count as taking a tax credit into account in an assessment. However, if an objection specifies entitlement to a tax credit within the 4-year period, and it is later determined that the taxpayer was indeed entitled to it, the entitlement will not cease.

The draft ruling sets out examples of the above issues.

ATO reference *Miscellaneous Taxation Ruling* MT 2024/D1
w https://www.ato.gov.au/law/view/document?docid=DXM/MT2024D1/NAT/ATO/00001

5.4 Changes to Overseas Aid Gift Deduction Scheme

From 1 January 2024, applications for DGR status under the category of a developing country relief fund or organisation (item 9.1.1) are administered by the ATO, replacing the Overseas Aid Gift Deduction Scheme.

An overseas aid fund endorsed prior to 1 January 2024 is subject to transitional provisions.

Taxation Ruling TR 95/2, which provided guidance for organisations seeking DGR status under the Overseas Aid Gift Deduction Scheme, was withdrawn with effect from 29 February 2024.

The ATO has replaced TR 95/2 with website guidance published on 2 January 2024.

To be eligible for DGR endorsement as a developing country relief fund or organisation, the entity must:

1. have an ABN;
2. be either an institution registered with the ACNC as a charity or an Australian government agency, which maintains a gift fund, or a charity registered with the ACNC that operates a public fund;
3. have a principal purpose of delivering development or humanitarian assistance activities in a specifically listed country, or in partnership with entities in the listed country; and
4. be located in Australia.

The charity or Australian government agency must have appropriate DGR winding up and revocation clauses.

The ATO guidance sets out sample clauses and the manner in which entities may apply to the ATO.

w https://www.ato.gov.au/law/view/document?docid=TXR/TR952/NAT/ATO/00001
w https://www.ato.gov.au/businesses-and-organisations/not-for-profit-organisations/getting-started/in-detail/types-of-dgrs/a-k/developing-country-relief-fund-or-organisation

5.5 GST – supplies of combination food

On 28 February 2024, the ATO finalised its guidance on the GST implications of supplies of combination food. *Goods and Services Tax Determination* GSTD 2024/1 provides guidance on when a supply is a supply of

"combination food", i.e. food that is a combination of one or more foods, where at least one of the foods is not GST-free per the third column of the table in clause 1 of schedule 1 to the GST Act.

GSTD 2024/1 follows the decision in *Chobani Pty Ltd and Commissioner of Taxation [2023] AATA 1664*, where the AAT considered whether Chobani Flip Strawberry Shortcake flavoured yoghurt was a combination food that was not GST-free. The product comprised flavoured yoghurt in a plastic tub compartment with dry inclusions (cookie pieces and chocolate chips) in a smaller compartment. In that case, the AAT accepted that a classification of a food product involves questions of fact and degree, objectively taking all factors into account. The AAT held that the cookie pieces and chocolate chips were not insignificant, remained readily identifiable and were not subsumed into a separate product. Therefore, the yoghurt, cookie pieces and chocolate chips were a combination food under section 38-3(1)(c) and the supply of the product was a taxable supply.

In GSTD 2024/1, the Commissioner set out his view in relation to the meaning of combination food in s 38-3(1)(c):

1. a supply of a combination food involves the supply of food that includes at least one separately identifiable taxable food;
2. a food is separately identifiable when it can be individually perceived by ordinary visual inspection;
3. the word 'combination' in s 38-3(1)(c) takes its ordinary meaning, being a 'product or outcome of joining two or more things together in some way';
4. whether separately identifiable foods are sufficiently joined together so that they form a combination food is a matter of overall impression, having regard to factors including physical appearance and packaging, labelling, marketing, product design, manner of sale and consumer experience
5. a separately identifiable taxable food may be so integrated into the overall product, or be so insignificant within that product, that it has no effect on its characterisation; and
6. whether food is a combination food must be determined at the point of supply.

The Commissioner has also set out the following 3 principles when determining whether there is a supply of a combination food:

1. Principle 1 – there must be at least one separately identifiable taxable food;
2. Principle 2 – the separately identifiable taxable food must be sufficiently joined together with the other components of the overall product at the time of sale; and
3. Principle 3 – the separately identifiable taxable food must not be so integrated into the overall product, or be so insignificant within that product, that it has no effect on its characterisation.

GSTD 2024/1 provides examples of when food products are combination foods.

GSTD 2024/1 applies both before and after its date of issue. However, GSTD 2024/1 does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue.

ATO reference *Goods and Services Tax Determination* GSTD 2024/1
w https://www.ato.gov.au/law/view/document?docid=GSD/GSTD20241/NAT/ATO/00001

5.6 Update to the GST status of major food and beverage product lines

The Goods and Services Tax Industry Issues Detailed Food List (the **Detailed Food List**) provides details of the GST status of major food and beverage product lines.

The Detailed Food List has been amended following the release of GSTD 2024/1 to align relevant entries with GSTD 2024/1, add new food and beverage product lines, merge similar entries and update several entries to better explain why they are GST-free.

ATO reference *Goods and Services Tax Industry Issues Detailed Food List*
w https://www.ato.gov.au/law/view/document?docid=GII/GSTIIFL1/NAT/ATO/00001

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6. Private Binding Rulings

6.1 Connected entity for small business entity rules – 'control' of the entity

Facts

Company A is an Australian incorporated company and a tax resident of Australia.

The shareholders of Company A were originally an entity who held 51% shares and two individuals who held 24.5% shares each through their entities.

The shares were ordinary shares that had equal rights to voting and the distribution of income and capital.

The two individuals sold their aggregated 49% interest in Company A to Company B.

Throughout the ruling period, the 51% shareholder in Company A was able to control Company A. The 51% shareholder also serves as a director on the Company A's board of management, along with three other directors.

Company B's annual turnover will exceed $50 million for the relevant ruling period.

Questions

1. For the purposes of determining aggregated turnover in accordance with section 328-115 of the ITAA 1997, for the relevant ruling period, is the 49% shareholder in Company A, being Company B, connected with Company A within the meaning given by section 328-125 of the ITAA 1997?
2. Is Company A a base rate entity within the meaning of Section 23AA of the *Income Tax Rates Act 1986*?
3. Will the Commissioner exercise the discretion under section 328-125(6) of the ITAA 1997 to determine that Company B does not control Company A, for the purposes of calculating aggregated turnover?

Ruling

<u>‘Connected with’</u>

Company B has a shareholding of more than 40% but less than 50% in the Company A and it satisfies the control percentage requirement in section 328-125(2)(b) of the ITAA 1997. As such, Company B directly controls Company A and Company A will be connected with Company B, based on the test in section 328-125(2) of the ITAA 1997.

<u>Base Rate Entity</u>

The aggregated turnover of Company B should be included in the aggregated turnover of Company A given they are connected under the direct control test contained in section 328-125(2) of the ITAA 1997. As the aggregated turnover of Company A and Company B will exceed $50 million, Company A will not be a base rate entity.

<u>Commissioner's discretion to disconnect Company A and Company B</u>

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The Commissioner exercised the discretion contained in subsection 328-125(6) of the ITAA 1997 to determine that the Company B does not control Company A for the relevant ruling period.

Section 328-125(6) of the ITAA 1997 provides, where the first entity has a control percentage of at least 40% but less than 50%, the Commissioner can exercise a discretion to determine that the first entity does not control the test entity, provided that the Commissioner can positively conclude that there is actual control by a third entity or entities.

The Commissioner referred to *Taxation Determination* TD 2023/5, where it is stated that he nature of control relevant for the Commissioner's discretion is control over matters typically associated with ownership of a business entity. That is, entitlements to income and capital of the entity as well as participation in decision making on key matters affecting the entity's constitution, funding, structure, and management. In contrast, the identity of who performs the managerial function is generally of limited relevance to the question of control of the test entity.

Given Company B has a control percentage of at least 40% but less than 50% in Company A, the first condition set out in section 328-125(6) of the ITAA 1997 is met. Further, the other shareholder held a 51% share in Company A, which allowed the other shareholder to control Company A in the matter contemplated by section 328-125(6) of the ITAA 1997.

COMMENT – while it is not set out in the ruling reasons, the implications should be that Company A may qualify as a base rate entity, as Company B’s turnover will no longer be included in Company A’s aggregated turnover because of the Commissioner’s exercise of discretion to treat the two companies as not being connected.

TRAP – it will often be the case, when applying the aggregated turnover test (such as for the CGT small business concessions or the instant asset write off), that the test can be satisfied in the current year or prior year, that is not the case with the base rate entity test, which only looks at the entity’s aggregated turnover for the income year, as worked out at the end of the income year.

ATO reference *Private Binding Ruling* Authorisation No. 1052197100264
w https://www.ato.gov.au/law/view/document?docid=EV/1052197100264

6.2 GST and car limit

Facts

The taxpayer is registered for GST.

In the 2022-23 financial year, the taxpayer purchased a vehicle for GST registered supplier.

The vehicle was purchased by the taxpayer for the purpose of carrying out the taxpayer's enterprise, and the vehicle will be solely for business use.

The vehicle has the following specifications:

1. the Gross Vehicle Mass for the vehicle is 3,450kg;
2. the Basic Kerb Weight for the vehicle is 2,749kg;
3. the payload/carrying capacity for the vehicle is 701kg;

4. the towing capacity for the vehicle is 4,500kg; and
5. the seating capacity for the vehicle is 5 people.

Question

Is the taxpayer entitled to a full input tax credit for the GST included in the price of the vehicle?

Ruling

The Commissioner ruled yes.

The Commissioner noted that the purchase of the vehicle was a creditable acquisition of the Taxpayer as it met the requirements set out in section 11-20 of the GST Act:

1. the taxpayer purchased the vehicle to carry on the taxpayer's enterprise and the vehicle will be used solely for business purposes. The vehicle will not be used for private and domestic purposes, and will not be used to make any input taxed supplies;
2. the supply of the vehicle to the taxpayer was a taxable supply;
3. the taxpayer provided consideration for the vehicle; and
4. the taxpayer is registered for GST.

The amount of the input tax credit would be equal to the GST payable unless:

1. the acquisition is only partly creditable; in which case, the GST credit is worked out based on the extent of the creditable purpose; or
2. the amount of the input tax credit exceeds 1/11th of the 'car limit'.

Section 69-10(1) of the GST Act limits the amount of input tax credit for a creditable acquisition or creditable importation of a 'car' to 1/11th of the 'car limit'. The term 'car' is defined in section 995-1 of the ITAA 1997 as a motor vehicle designed to carry a load of less than 1 tonne and fewer than 9 passengers.

Section 69-10(4) of the GST Act provides an exception to subsection 69-10(1) of the GST Act, where the vehicle is not a luxury car under subsection 25-1(2) of the *A New Tax System (Luxury Car Tax) Act 1999*. A vehicle is not a luxury car under the Luxury Car Tax Act if it is a commercial vehicle that is not designed for the principal purposes of carrying passengers.

The term 'commercial vehicle' is not defined in the Luxury Car Tax Act and takes on its ordinary meaning.

The Commissioner referred to *Miscellaneous Taxation Ruling MT 2024* that considered the appropriate basis for determining if of a vehicle is for the principal purpose of carrying passengers:

> *14...It is considered that the appropriate basis for determining this issue is whether or not the majority of the designed load capacity is attributable to passenger carrying capacity. This approach is consistent with that adopted under the Australian Design Rules (ADR) in determining what is a passenger vehicle.*

Section 4.5.2 of the Vehicle Standard (Australian Design Rule - Definitions and Vehicle Categories) 2005 states:

> *4.5.2 A vehicle constructed for both the carriage of persons and the carriage of goods shall be considered to be primarily for the carriage of goods if the number of seating positions times 68 kg is less than 50 percent of the difference between the 'Gross Vehicle Mass' and the 'Unladen Mass'.*

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In this circumstance, the vehicle can carry 5 passengers, meaning the passenger carrying capacity is 340kg (5 passengers x 68kg). The passenger weight of 340kg is less than 50% of the vehicle's carrying capacity of 701kg. As such, the vehicle has a principal purpose of carrying goods.

As the vehicle is not a car designed for the principal purpose of carrying passengers, the car limit will not apply to limit the input tax credit that can be claimed.

TIP – the car limit for the income year ended 30 June 2024 income year is $68,108.

ATO reference *Private Binding Ruling Authorisation No. 1052210643766*
w https://www.ato.gov.au/law/view/document?docid=EV/1052210643766

6.3 FBT, depreciation and car limit

Facts

The taxpayer purchased a utility to carry tool and materials for the work done by the taxpayer. The taxpayer subsequently had the vehicle modified to better accommodate the tools and materials required for the work done by the taxpayer. These modifications were completed before the taxpayer took delivery of the vehicle.

The carrying capacity of the vehicle is less than 1 tonne. The vehicle has company signage on its exterior.

The vehicle is sold as a dual cab utility or truck with 5 seats.

The vehicle was not purchased for carrying passengers and there is little capacity with the modifications for private use. This vehicle has been supplied to an employee for his work use.

The employee uses the vehicle to stores his tools and material and parks it at his residence overnight. He drives the vehicle straight to his first place of work in the morning and straight home from his last place of work each night.

Questions

1. Is the dual cab utility vehicle exempt from the car limit for depreciation purposes under section 40-230 of the ITAA 1997?
2. Is the dual cab utility vehicle an eligible vehicle for the purposes of the exemption in section 8 of the *Fringe Benefits Tax Assessment Act 1986* (Cth)?

Ruling

Car Limit for depreciation purposes

The Commissioner ruled that the car limit will not apply.

A deduction is available for the decline in value of a depreciating asset that is held by a taxpayer to produce assessable income under section 40-25 of the ITAA 1997. Under subsection 40-230(1) a taxpayer cannot claim more for the depreciation of their asset than the 'car limit' defined in subsection 40-230(3) for a vehicle designed mainly to carry passengers.

Under section 4.5.2 of the Vehicle Standard Australian Design Rule (ADR 2005) a vehicle designed to carry both goods and passengers is considered a goods vehicle if the number of seats multiplied by 68 Kilograms is

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less than half of the carrying capacity or payload of the vehicle, otherwise it will be considered a passenger vehicle.

In this case, the number of seats multiplied by 68 kilograms is less than half the carrying capacity of the vehicle. Therefore, it is considered as a goods vehicle and the car limit will not apply for depreciation purposes.

FBT

The Commissioner ruled that the vehicle is an exempt benefit pursuant to section 8(2)(b) of FBTAA.

Subsection 8(2) of the FBTAA states that a car benefit will be exempt if:

(a) the car is:
- *(i) a panel van or utility truck, designed to carry a load of less than 1 tonne; or*
- *(ia) used for taxi travel, designed to carry a load of less than 1 tonne, and not a limousine; or*
- *(ii) any other road vehicle designed to carry a load of less than 1 tonne (other than a vehicle designed for the principal purpose of carrying passengers); and*

(b) there was no private use of the car during the year of tax and at a time when the benefit was provided other than:
- *(i) work-related travel of the employee; and*
- *(ii) other private use by the employee or an associate of the employee, being other use that was minor, infrequent and irregular.*

Miscellaneous Taxation Ruling MT 2024 differentiates between utility trucks and dual cabs. As stated in paragraph 14 of this ruling a dual cab vehicle with a load carrying capacity of less than one tonne that is not designed principally for carrying passengers may qualify for the work-related use exemption under sub-section 8(2).

In this case, the vehicle is a goods vehicle with a carrying capacity of less than 1 tonne.

The vehicle is used for the transportation of tools and travel between work sites, and the capacity for private use is limited. Therefore, the Commissioner was satisfied that the only use of the vehicle will be work-related, and any private use will be minor, infrequent, and irregular as per provided in the facts.

ATO reference *Private Binding Ruling* Authorisation *No. 1052206662937*
w https://www.ato.gov.au/law/view/document?docid=EV/1052206662937

6.4 PSI business premises test

Facts

A company operates a legal practice and is also engaged in IT business consulting activity.

During the relevant income years, the company has entered into agreements with two entities for the provision of IT consulting services.

The individual who provides his personal services on behalf of the company undertakes his personal services work at the company's business premises. He attends the clients' premises only when requested for ad-hoc meetings.

The company holds a license to occupy and use a dedicated space within the commercial premises. It has been using this space for the legal practice work for years. There are various other businesses using other areas of the premises, some of which are on a long-term permanent basis or others that may use a space on an infrequent or sporadic schedule. The company conducts its business activities at an allocated space within the premises.

The allocated space includes signage displaying the company logo, making it distinct from other entities leasing sections of the shared office environment. Chairs and desks are provided to the company. The company has its own lockable storage at the allocated space in the premises.

The space is used by the company solely for the legal practice (not subject to PSI rules) and IT consulting activity.

The director and a number of employees work in the legal practice. One individual provides the IT consulting services on behalf of the company.

The company has a license agreement for the use of one of the spaces allocated to the company within the commercial premises.

The license extends to access and use of all of the available facilities in the commercial premises (e.g., kitchen, café, meeting spaces, printing facilities etc.). The license also grants access to the company's team members.

The key features of the agreement include:

1. the license does not grant the company exclusive right to any part of the building premises and no relationship of landlord and tenant is created between the parties. The agreement is not a lease or commercial tenancy agreement and does not confer any interest in the premises on the company or grant the company any rights except as expressly set out in the Agreement;
2. the owner of the premises retains control, possession and management of the commercial premises;
3. the company must not assign, license, part with, share the possession of (other than their team members), grant any mortgage, charge or otherwise deal with the allocated space, memberships, license or the agreement;
4. the owner of the premises reserves the right to require the company to relocate to an alternative office during the license period (either in the same building premises or in an alternative premises operated by the owner), by providing the company with at least three months' written notice.

Question

Does the company meet the business premises test under subsection 87-30(1) of the ITAA 1997 for the IT consulting services provided?

Ruling

The ATO ruled no.

PSI is income that is mainly a reward for an individual's personal efforts or skills, or would mainly be such a reward if it was the income of the individual.

A taxpayer conducts a personal services business (**PSB**), and the PSI rules will not apply, if one of the four personal services business tests is met in the income year.

If the PSI rules apply, the net PSI received by the personal services entity (PSE) will be attributed to the individual who generated that income and available deductions are restricted.

There are four personal services business tests:

1. the results test;
2. the unrelated clients test;
3. the employment test, and
4. the business premises test.

Only one test is required to be met for the PSI rules not to apply.

The question is whether the company meets the business premises test for the personal services provided by the test individual (i.e. for the person providing the IT consulting services).

The business premises test

The business premises test requires that, at all times during the income year, the sole trader or PSE maintains and uses business premises:

1. where the main activities conducted there gain or produce PSI; and
2. of which they have exclusive use; and
3. that are physically separate from any premises that they (or any associate) use for private purposes; and
4. that are physically separate from the premises of the service acquirer (or any associate of the service acquirer).

Business premises

"Business premises" are premises that have the usual physical attributes and fixtures associated with commercial or business usage and, from a business and commercial perspective, are apt for the purpose of carrying on a business.

Maintains and uses

It is a requirement that the sole trader or PSE maintains and uses the business premises at all times in the income year. This means that the sole trader or PSE must do more than merely have leased premises in its name to pass the test. The premises should actually be used to produce the PSI.

Business premises may be maintained by ownership or by way of occupancy under a lease, sublease, license or possession. However, not all of these occupancy arrangements satisfy the "exclusive use" requirement of the test.

There is no requirement for running costs associated with the premises, such as cleaning or utility costs, to be borne by the sole trader or PSE.

At all times in the income year

The sole trader or PSE must have a business premises for the whole period during which activities are conducted for the purpose of generating PSI.

Where a sole trader or PSE commences or ceases activities during the income year, it is sufficient that the business premises are maintained and used for that part of the income year in which the activities are conducted.

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Changing business premises

A sole trader or PSE is not required to maintain and use the same business premises throughout the whole year.

Main activities generate PSI

The generation of PSI must be the primary usage to which the business premises are put. Where more than one activity is conducted at the premises it is necessary to determine which activities generate PSI and which activities generate non-PSI. If more than 50% of the activities conducted at the premises are directed at producing PSI, this requirement will be met.

Exclusive use

A sole trader or PSE is required to have exclusive use of the business premises. This will be satisfied where premises are occupied under ownership or lease as the legal nature of the proprietary interest allows the holder to determine who may or may not enter the premises and therefore, they have exclusive use for the purposes of the test.

A sole trader or PSE cannot have exclusive use of the premises if they do not have exclusive possession. If the owner grants permission for the occupation of premises amounting to a license and not a lease, the individual sole trader or PSE does not have exclusive use of the premises.

A sole trader or PSE cannot lease premises together with another individual or entity on the basis that they share the premises to meet this requirement. As joint lessees, neither lessee has exclusive use of the premises.

Shared areas

Shared areas such as reception and waiting rooms are considered ancillary to the business premises and are not included for the purposes of the business premises test.

Physically separate

Business premises must be physically separate from premises that the sole trader or PSE (or their associates) use for private purposes.

For example, a PSE may lease a shed in an associate's back yard as its business premises. As the shed is part of the premises used by the associate for private purposes, the shed is not physically separate. The visual impression of the premises is that the entirety of the dwelling and surrounds (curtilage) is for private purposes.

On the other hand, if the PSE leased a shed in an associate's backyard that had its own entry from the road and was blocked off from the associate's private residence by a fence with no access to the private residence then the shed may be considered as physically separate. The visual impression in this case is that the business premises are physically separate to the associate's private premises.

The business premises must also be physically separate from the premises of the service acquirer or an associate of the service acquirer. For example, where a sole trader or PSE leases a room within the premises of the service acquirer for its business premises, the room is not considered to be physically separate from the premises of the service acquirer and would not meet what is required for the business premises test.

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On the other hand, where a sole trader or PSE leases a discrete floor or part of a floor from the service acquirer for its business premises, such premises may be physically separate from the premises of the service acquirer depending on such factors as:

1. the extent to which the floors or parts of floors are functionally and physically integrated with each other;
2. entry and exit facilities;
3. signage;
4. security arrangements, and
5. occupancy rights.

The Company states that the allocated space is being used for legal practice (not subject to PSI rules) and for IT consulting services. The company has the director and a number of employees to perform the work in relation to the legal practice. The company has one individual providing IT consulting services on its behalf.

To determine whether the business premises test has been met in relation to the PSI generated from the IT consulting services, we examined the conditions under subsection 87-30(1) of the ITAA 1997.

The Company conducts two activities i.e., legal practice and IT consulting and the latter generates PSI. The legal practice has the director and a number of employees working on the premises. Hence, the main activities conducted at the premises in the relevant years relate to the legal practice. Further, a higher percentage of the total income has been generated from the legal practice in the relevant years.

Accordingly, this condition of the business premises test has not been satisfied.

Did the company have exclusive use of the business premises?

A sole trader or PSE cannot have exclusive use of the premises if they do not have exclusive possession.

Although the Company has an allocated space to conduct its business activities, the terms of the license agreement do not confer exclusive possession of the space to the Company. The license agreement provides:

1. the Company does not have an exclusive right to any part of the premises;
2. the owner of the commercial premises retains control, possession and management of the premises and the Company has no right to exclude the owner from any part of it, including the allocated space;
3. the owner of the commercial premises has the right to require the Company, at any time on giving reasonable notice, to transfer to a comparable area elsewhere within the premises and the company must comply with such requirement.

In *Radaich v Smith* (1959) 101 CLR 209, the High Court held that in determining whether an instrument creates a lease or a license, the decisive factor in favour of a lease was whether the instrument conferred a right to exclusive possession. In this case, the appellants and the respondent became the parties to a deed dated 29th May 1954 which witnessed that the respondents, as licensors, thereby granted to the appellant, as licensee, for a term of five years from the date of the deed, "the sole and exclusive license and privilege to supply refreshments to the public admitted to premises.

Therefore, this condition of the business premises test is not satisfied.

Are the business premises physically separate from any premises that the company (or their associates) use for private purposes?

Based on the information, the allocated space within the commercial premises is used by the company solely for business purposes.

The license agreement does not grant the company exclusive use of the premises. Further, the main activities conducted at the premises relate to the legal practice and the activities generating PSI from the IT consulting services represent a smaller proportion of the activities conducted at the premises during the relevant years. Accordingly, the Commissioner was not satisfied that the business premises test under section 87-30(1) of the ITAA 1997 has been met in relation to the IT consulting services in the income years ended 30 June 2022 and 30 June 2023.

TRAP – whether the IT consultant was a shareholder or director of the Company was not relevant to the application of the PSI rules. The PSI rules cannot operate regardless of whether the person conducting the 'personal services' is a shareholder or director of the relevant entity that earns the personal services income.

ATO reference *Private Binding Ruling Authorisation No. 1052209308650*
w https://www.ato.gov.au/law/view/document?docid=EV/1052209308650

6.5 Apportionment of sale price

Facts

The taxpayer sold two units in 2022 under separate contracts for sale. Unit A and Unit B are adjacent and a premium price was paid for the two units.

The taxpayer inherited Unit A prior to 20 September 1985, and purchased Unit B after 20 September 1985 for $Y.

The taxpayer resided in Unit B with her family for a number of years until they moved out to live in another property. From around March 200X, Unit B was rented out to third parties and the taxpayer began receiving rental income from it.

A subsequent valuation report has been obtained by the taxpayer that provides that Unit A and Unit B were valued individually as follows:

1. the market value of Unit A (the pre-CGT unit) as at the date of sale was $X plus Z;
2. the market value of Unit B (the post-CGT unit) as at the date of sale was $X less Y.

There is a difference in size and amenity between the units, with Unit B being the larger unit.

The taxpayer originally requested that the sale of the two units be dealt with in a single contract given that they were being sold together.

The taxpayer's real estate agent and conveyancer both told her that it did not matter if the properties were sold under separate contracts or one contract, and that if they were sold under two contracts, the split of the proceeds between the two contracts did not matter.

The taxpayer relied on the advice of the real estate agent and conveyancer and agreed to sell the properties under separate contracts. When the properties were sold in June 2022 the agreed price for both units of 2 times $X was split equally between the two contracts.

Question

Can the taxpayer apportion the sale price based on market value for each property to work out her capital gain?

Ruling

The ATO ruled no.

The ATO explained that the sale of the units will result in CGT event A1 for each unit and that you make a capital gain if the capital proceeds from the disposal are more than the asset's cost base. A capital gain is disregarded if you acquired the asset before 20 September 1985. The ATO referred to section 116-20 of the ITAA 1997, which provides that capital proceeds from a CGT event are, relevantly, the total of the money you have received or are entitled to receive in respect of the event happening.

The ATO noted that in this case the money received for each unit, being the agreed contract price of $X will be the capital proceeds of the CGT event.

The ATO referred to section 116-30 of the ITAA 1997, the "market value substitution rule", which provides:

> *(2) The capital proceeds from a CGT event are replaced with the market value of the CGT asset that is the subject of the event if:*
>
> *(a) some or all of those proceeds cannot be valued; or*
>
> *(b) those capital proceeds are more or less than the market value of the asset and:*
>
> *(i) you and the entity that acquired the asset from you did not deal with each other at arm's length in connection with the event; or*
>
> *(ii) the CGT event is CGT event C2 (about cancellation, surrender and similar endings).*
>
> *(The market value is worked out as at the time of the event.)*

The ATO stated that in the present case it would be necessary to show both that the capital proceeds are more or less than the market value, and that the parties did not deal with each other at arm's length.

The ATO noted that in the present circumstances, the purchaser and the vendor were unrelated parties and agreed on a price and a pricing structure for each unit that was the subject of a genuine and arm's length bargain between the parties.

Further, the ATO noted that whilst it is possible that, sold individually, the units may have had a different value, that is not what has occurred in this case. There was an agreement to sell both the properties and the value of each property was dependent on the sale of the other property. In this case, the bargain struck between the arm's length parties would be expected to be reflected in the price for each unit notwithstanding that this price may deviate from a theoretical value for an individual value.

The ATO also referred to the face that the capital proceeds in this case, being the price for each unit, is also the price that is relevant for other regulatory and taxation matters including determining the cost base for the purchaser and the relevant transfer duty on the sale.

The ATO referred to its guidance in TD 98/24[1] in relation to the second market value modification rule. TD 98/24 outlines how the ATO will generally view prices reached by parties acting at "arm's length".

> *2. On a CGT event happening to the real property, that CGT event happens to each separate asset comprising the property and a separate capital gain or loss calculation is necessary for each CGT asset. The capital proceeds from each CGT event are so much of the overall capital proceeds as is reasonably attributable to that event (subsection 116-40(1)).*

3. If the property is disposed of under a contract and parties dealing with each other at arm's length allocate the overall capital proceeds to the separate assets in the contract, we will accept the allocation for the purpose of subsection 116-40(1).

4. We will accept a later agreement, between the parties in paragraph 3, that allocates the capital proceeds if this was not done in the original contract.

The ATO noted that there are circumstances where unrelated parties may be considered to be acting otherwise than at arm's length, however the facts of this case would not extend to reaching a view that the unrelated vendor and purchaser were acting other than at arm's length. The issue is discussed extensively in *Commissioner of Taxation v AXA Asia Pacific Holdings Ltd [2010]* FCAFC 134 where Edmonds and Gordon JJ, in the majority stated:

In the end, what must be borne steadily in mind is that any assessment of whether parties were dealing at arm's length is a question of fact and that question of fact is resolved by "an assessment [of] whether in respect of that dealing they dealt with each other as arm's length parties would normally do, so that the outcome of their dealing is a matter of real bargaining".

Having regard to circumstances where unrelated parties were not acting at arm's length, it was noted by Lee J in *Granby Pty Ltd v Federal Commissioner of Taxation (1995)* 129 ALR 503:

That is not to say, however, that parties at arm's length will be dealing with each at arm's length in a transaction in which they collude to achieve a particular result, or in which one of the parties submits the exercise of its will to the dictation of the other, perhaps, to promote the interests of the other.

The ATO concluded that CGT event A1 happened when the taxpayer disposed of Unit A and the capital proceeds is the money the taxpayer received in respect of the event happening. Similarly, CGT event A1 also happened when the taxpayer disposed of Unit B and the capital proceeds is the money the taxpayer received in respect of the event happening.

ATO Reference *Private Binding Ruling Authorisation No. 1052190852669*
w https://www.ato.gov.au/law/view/document?docid=EV/1052190852669

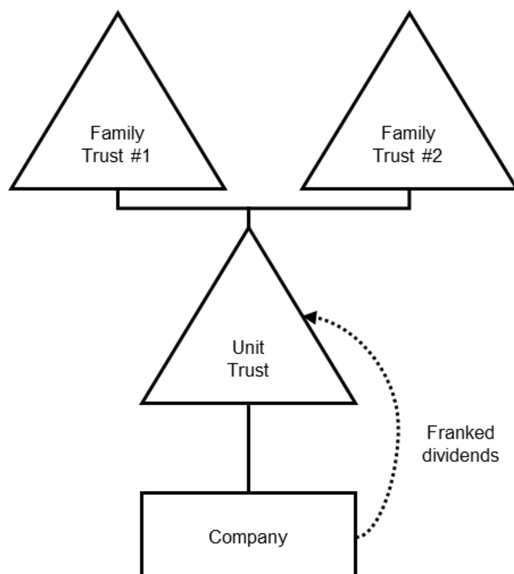
6.6 Franking credits and trusts without FTEs

Facts

A unit trust holds shares in a number of companies and expects to commence receiving franked dividend income from these shareholdings.

The unitholders of the unit trust are two non-associated discretionary trusts. The discretionary trust unitholders have, or will have, made family trust elections such that they will each be classified as a "family trust" for the purposes of Schedule 2F of the ITAA 1936.

The unit trust does not and will not have a family trust election in place.



The trustee has not and does not intend to exercise a power capable of defeating a unitholders interest in the income or capital of the trust during the relevant period.

The only class of units on issue in the unit trust during the relevant period will be ordinary units. The ordinary units carry equal rights to the income and capital of the trust fund. No streaming of the distributable income or capital of the trust may happen in any way that is not directly proportionate to each unitholder's respective interest in the trust.

The current unitholders were also the initial unitholders and to date no new units have been issued.

Any distributions and related franking credits will be made proportionate to the number of units held by the unitholders.

There will be no ‘related payments’ in relation to the dividends.

Questions

1. Will the unitholders be entitled to claim the offset for franking credits, on the basis that they are 'qualified persons' for section 207-150(1)(a) of the ITAA 1997?
2. If not, will the Commissioner exercise the discretion in former subsection 160APHL(14) of the ITAA 1936 to treat the unit trust as a fixed trust?

Ruling

<u>Will the unitholders be "qualified persons" under section 207-150(1)(a) of the TIAA 1997?</u>

The ATO ruled no.

Qualified person and shares

Subject to the operation of section 207-150 of the ITAA 1997, section 207-45 of the ITAA 1997 provides that an entity to which a franked distribution flows indirectly in an income year is entitled to a tax offset for that income year equal to its share of the franking credit on the distribution.

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A franked distribution is taken to flow indirectly to a beneficiary of a trust estate for the purposes of section 207-45 of the ITAA 1997 where the three requirements of paragraphs 207-50(3)(a)-(c) of the ITAA 1997 are satisfied:

1. first, during that income year the distribution must be made to the trustee of the trust;
2. second, the beneficiary must have a share of the trust's net income for that income year in the relevant sense;
3. third, the beneficiary's share of the distribution as identified in accordance with section 207-55 of the ITAA 1997 must be a positive amount.

A beneficiary of a trust to whom a franked distribution flows indirectly is only entitled to the tax offset under 207-45 of the ITAA 1997 if they are a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936 in relation to the distribution. This rule is sometimes referred to as “the 45-day rule”.

The Commissioner’s interpretation of sections 207-145 and 2017-150 of the ITAA 1997 are set out in TD 2007/11. TD 2007/11 states that regard must be had to the 45-day rule in determining whether a person is a qualified person and hence able to derive the benefit of franking credits attached to distributions made directly or indirectly to the entity.

Importantly, a beneficiary of the trust cannot be a qualified person in relation to a franked distribution which has indirectly flowed to them through a trust, unless the trustee of the trust is itself a qualified person in relation to the distribution (former subsection 160APHU(1) of the ITAA 1936).

As such, unitholders cannot be qualified persons in relation to franked distributions flowing indirectly to them as beneficiary of the trust unless the trustee is also a qualified person in relation to the distributions, that is the trustee satisfies the holding period rules and, where relevant, related payment rules of former section 160APHO of the ITAA 1936 in respect of the franked distributions.

According to former paragraph 160APHO(1)(a) and former subparagraph 160APHO(2)(b)(i) of the ITAA 1936, a taxpayer will be a qualified person if all of the following apply:

1. the taxpayer holds an interest in shares (not being preference shares) on which a dividend has been paid;
2. neither the taxpayer, nor an associate of the taxpayer has made, is under an obligation to make or is likely to make a ‘related payment’ in respect to the dividend; and
3. during the ‘primary qualification period’, they the taxpayer held its interest in the shares for a continuous period of not less than 45 days.

Under former subsection 160APHG(3) of the ITAA 1936, the beneficiaries of a trust that is not a widely held trust are deemed to have acquired, held or disposed of an interest in shares when the trustee acquires, holds or disposes of those shares.

The 'primary qualification period' is defined in former section 160APHD of the ITAA 1936 as the period beginning on the day after the day the taxpayer acquired their interest in the share and ends on the 45th day after the day on which the interest became ex-dividend.

In accordance with former subsection 160APHO(3) of the ITAA 1936, in calculating the number of days for which unit holders continuously held an interest in a share held by the trust, any days on which unit holders had "materially diminished risks of loss or opportunities for gain in respect of the shares or interest are to be excluded" (although this exclusion is not taken to break the continuity of the period for which the interest was held).

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A "unitholder in a unit trust whose deed permits the issue of new units at the trustee's discretion and at a price determined by the trustee" is not a qualified person for the purposes of paragraph 207-150(1)(a) of the ITAA 1997 in relation to dividends where the trustee has held the shares at risk for more than 45 days if there is no family trust election (*ATO Interpretative Decision* ATO ID 2005/172).

Former subsection 160APHL(12) of the ITAA 1936 (certain interests in trust holding taken to be defeasible) states:

> *subject to subsection (13), if the taxpayer has an interest in the trust holding and either:*
> *(a) the interest may be redeemed under the terms of the trust for less than its value; or*
> *(b) the value of the interest may be materially reduced by:*
> *(i) if the trust is a unit trust - the issue of further units; or*
> *(ii) otherwise - the creation of other interests under the trust;*
> *the interest is taken to be defeasible.*

Former subsection 160APHL(13) of the ITAA 1936 provides a 'savings rule' in relation to defeasible interest:

> *if:*
> *(a) the trust is a unit trust and the taxpayer holds units in the unit trust; and*
> *(b) the units are redeemable or further units are able to be issued; and*
> *(c) where units in the unit trust are listed for quotation in the official list of an approved stock exchange (within the meaning of section 470) - the units held by the taxpayer will be redeemed, or any further units will be issued, for the price at which other units of the same kind in the unit trust are offered for sale on the approved stock exchange at the time of the redemption or issue; and*
> *(d) where the units are not listed as mentioned in paragraph (c) - the units held by the taxpayer will be redeemed, or any further units will be issued, for a price determined on the basis of the unit trust's net asset value, according to Australian accounting principles, at the time of the redemption or issue;*
>
> *then the mere fact that the units are redeemable, or that the further units are able to be issued, does not mean that the taxpayer's interest, as a unit holder, in so much of the corpus of the trust as is comprised by the trust holding is defeasible.*

The Commissioner accepts that the trust deed provides the unitholders with a vested interest in the income and capital of the trust.

However, the vested interest is not indefeasible. While the power to issue and redeem units may satisfy the savings rule in former subsection 160APHL(13) of the ITAA 1936, there are other various clauses in the trust deed which may, or would, cause a beneficiary's interest to be defeasible.

In the present circumstances the trustee may, with the consent of the unitholders, issue further units at the unit value. The interest will be taken to be defeasible if the issue of new units would have the effect of materially reducing the value of the relevant interest. As the trustee is at liberty to determine the issue price of any new units that may be issued, former subsection 160APHL(13) of the ITAA 1936 will not apply should the trustee determine the issue price of the units in contravention of the requirements of former subsection 160APHL(13) of the ITAA 1936. Consequently, the unitholder will not be a qualified person in relation to any dividend paid on the shares.

<u>Will the Commissioner exercise the discretion in the former subsection 160APHL(14) of the TIAA 1936?</u>

The ATO ruled yes.

As noted above in Question 1, the unitholders do not have an indefeasible interest in so much of the corpus of the trust under former subsection 160APHL(11) of the ITAA 1936.

Former subsection 160APHL(14) of the ITAA 1936, provides the Commissioner with the discretion to treat such beneficiaries as having a fixed interest where it is reasonable to do so based upon the following factors prescribed in subsection 160APHL(14) of the ITAA 1936:

> *(14) If:*
> *(a) the taxpayer has an interest in so much of the corpus of the trust as is comprised by the trust holding; and*
> *(b) apart from this subsection, the interest would not be a vested or indefeasible interest; and*
> *(c) the Commissioner considers that the interest should be treated as being vested and indefeasible, having regard to:*
> *(i) the circumstances in which the interest is capable of not vesting or the defeasance can happen; and*
> *(ii) the likelihood of the interest not vesting or the defeasance happening; and*
> *(iii) the nature of the trust; and*
> *(iv) any other matter the Commissioner thinks relevant;*
> *the Commissioner may determine that the interest is to be taken to be vested and indefeasible.*

Former paragraph 160APHL(14)(a) – interest in corpus of the trust

Former paragraph 160APHL(14)(a) of the ITAA 1936 contains a "threshold" condition that the taxpayer has an interest in the corpus of the trust. An interest for these purposes is considered to be a "vested interest" and not a "contingent" interest (an interest that does not take effect until certain conditions are met).

In this case, a clause of the deed effectively provides that the trustee determine whether any payments in connection with any property shall be credited or debited to capital or to income. There is no contingency that exists.

Former paragraph 160APHL(14)(b) – interest not vested or indefeasible

As discussed above in Question 1, although a unitholder's interest in the corpus of the Trust is vested, the trust deed contains certain clauses which cause a unitholder's interest in a share of the corpus of the unit trust to be defeasible.

Former paragraph 160APHL(14)(c) - relevant factors

The factors the Commissioner must consider are:

> *(i) the circumstances in which the interest is capable of not vesting or the defeasance can happen; and*
> *(ii) the likelihood of the interest not vesting or the defeasance happening; and*
> *(iii) the nature of the trust; and*
> *(iv) any other matter the Commissioner thinks relevant.*

Other matters the Commissioner may consider relevant are found in *Practical Compliance Guideline* PCG 2016/16 *Fixed entitlements and fixed trusts* at paragraphs [34] and [35].

The nature of the Trust

Taking into account the factors mentioned in paragraph [34] of PCG 2016/16, it is noted that, based on the statements provided:

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the unit trust is closely-held and was established for the purpose of undertaking commercial transactions The company holds a license to occupy and use a dedicated space within the commercial premises. It has been using this space for the legal practice work for years. There are various other businesses using other areas of the premises, some of which are on a long-term permanent basis or others that may use a space on an infrequent or sporadic schedule. The company conducts its business activities at an allocated space.

1. and investments to derive income/profits for the benefit of its unitholders;
2. the trustee wishes to pass on dividends, if received, to the unitholders. At the date of the ruling application, the trust has two unitholders;
3. since its inception, the unit holding proportions has not changed, the current unitholders were the initial unitholders;
4. the interests of the unitholders are not contingent, it is not a discretionary trust, the trust does not have default capital beneficiaries;
5. the trustee will only redeem units at unit value;
6. the trustee has the power to amend the provisions of the trust deed, but this is only possible with the unanimous consent of all unitholders;
7. the trustee does not intend to exercise its amendment power to affect the law against perpetuities, or confer a benefit on any person other than the unitholders; and
8. it is considered, in this instance, that the circumstances and likelihood in which each unitholder's entitlement is capable of not vesting or the defeasance happening are reduced in this trust.

Other considerations

As per paragraph [35] of PCG 2016/16, the Commissioner must consider whether the exercise of the discretion would allow a person to obtain a tax benefit from a trust claiming a deduction for a tax loss, bad debt deduction or debt/equity swap deduction when the person did not bear the economic loss incurred by the trust.

The ATO noted that:

1. only one class of units has been issued (and no other classes of units may be issued) and each unit is of equal value and has the same rights;
2. no streaming of the distributable income or capital of the trust may happen in any way that is not directly proportionate to each unitholder's respective interest in the trust.

The trustee has said it is not proposed to make amendments to the trust deed during the ruling period.

The Commissioner will exercise the discretion under former subsection 160APHL(14) of the ITAA 1936 to treat the unitholders of the trust as having a vested and indefeasible interest in so much of the corpus (capital) of the trust as is comprised by the trust holding (being the trustee's ownership of shares).

TRAP – many taxpayers assume that a unit trust will be able to pass through franking credits to unitholders. As demonstrated in this ruling decision, there are detailed steps to work out whether the trustee of a unit trust will be a “qualified person”. In some circumstances, a unit trust may be able to resolve this by making a family trust election. However, not all unit trusts will satisfy the family control test required to make such an election, and an election will not be appropriate where there are unitholders from different family groups (as in this case). Care should be taken before making any family trust election.

COMMENT - PCG 2016/16 is expressly stated only to apply for the purpose of determining whether a trust is a fixed trust under the trust loss rules. However, that the Commissioner considered PCG 2016/16 in this

private ruling suggests that the principles contained in PCG 2016/16 are relevant to other circumstances where consideration needs to be given to whether a trust is a fixed trust, such as franking credit rules and Division 855 of the ITAA 1997.

ATO reference *Private Binding Ruling* Authorisation *No. 1052127494311*
w https://www.ato.gov.au/law/view/document?docid=EV/1052127494311

6.7 Vacant land measures and deductibility of expenses for proposed rental property

Facts

The taxpayer purchased land with the intention to build a dwelling and offer a relocatable dwelling for short term rentals. The dwelling is also to serve as caretaker's quarters.

The taxpayer's proposed business is permitted within the zoning of the land. The land has always been a vacant lot and still is.

The taxpayer has commenced initial site preparations that do not require development approval and is in the process of gathering necessary reports to submit plans for the dwelling for development approval. The taxpayer is investigating the sites suitability for eco-tourism accommodation. Once the taxpayer obtains development approval, the taxpayer intends to install relocatable dwellings for "glamping". The taxpayer expects to have these ready to rent out in the next financial year.

The taxpayer will also need to arrange connection to services, access to the sites and construction of utilities. The current plan is to have one relocatable dwelling that can be advertised as available to rent by spring the following year. The taxpayer then hopes to expand that operation. The taxpayer also intends to landscape the gardens to regenerate the endemic forest environment.

The taxpayer expects to be living in the caretaker's cottage during the first year of operation while the grounds are landscaped and the relocatable dwelling is fitted out. In the long term, the taxpayer will rent out the caretaker's cottage.

The taxpayer intends to advertise this accommodation online and through a dedicated web page. The accommodation will be listed on the mandatory state short-term rental accommodation premises register. The taxpayer also intends to take out a general insurance package that will be suitable for this activity and cover buildings, contents, and public liability.

The taxpayer has calculated an estimated projected income from the relocatable dwelling. The taxpayer considers that renting out the cottage will generate twice the amount of income as the "glamping".

The taxpayer's estimated expenses in the relevant financial year include the purchase price of relocatable dwellings, the construction cost of the caretaker's cottage, the cost of the landscaping, and the cost of council rates, utilities, and insurance.

The taxpayer will use a web-based package to ensure accurate records are kept, which will also allow the taxpayer to meet their tax obligations. The management of all business operations will be done from a dedicated office within the caretaker's cottage.

The taxpayer is currently employed full-time on a shift roster allowing the taxpayer to carry out work from time to time on this activity. It is intended that the taxpayer's spouse will be working full time on the activity. The taxpayer hopes sufficient income will be generated from this activity to allow the taxpayer and their spouse to transition to retirement.

The taxpayer has owned other rental properties and run a small business. The taxpayer's spouse also has work experience in catering and as a residential cleaner.

Questions

1. Can the taxpayer claim deductions for expenses associated with holding the vacant land?
2. Can the taxpayer claim deductions for expenses associated with renting the proposed properties in the relevant financial year under section 8-1 of the ITAA 1997?
3. Can the taxpayer claim a deduction for decline in value or capital works prior to letting the proposed rental properties?

Ruling

Can expenses associated with holding vacant land be claimed as deductions?

The ATO ruled no, on the basis that the taxpayer is not carrying on a business.

The ATO explained that the circumstances under which costs associated with holding vacant land can be claimed as deductions are described in *Taxation Ruling TR 2023/3 Income tax: expenses associated with holding vacant land*. This ruling describes the operation of section 26-102 of the ITAA 1997 in limiting the costs associated with holding vacant land that can be claimed as deductions. Vacant land is land on which there is "no substantial and permanent structure in use or available for use". Residential premises that you install or build will be considered "substantial and permanent structures" when they are legally certified as fit for occupation and are available for lease, hire, or licensing.

Costs associated with holding vacant land can be claimed as deductions when the land is being used to carry on a business. The factors taken into consideration in determining if a taxpayer is carrying on a business are discussed in *Taxation Ruling* TR 97/11 and were addressed by the ATO in its reasons.

Whether the activity has a significant commercial purpose or character

The initial scale of the proposed activity, one relocatable dwelling with additional services, is small. As at the time of the relevant financial year there will be no dwellings on the property used for income producing purposes.

Whether there is more than an intention to engage in business

For a business to be carried on there must be activity that has a direct connection with the generation of income. Activity that is preparatory in nature or experimental will not be considered a business. The taxpayer's income generating activity will commence when the taxpayer is able to advertise their relocatable dwelling as genuinely available for rent in the year following the relevant financial year. There will be no income generated from the property in the relevant financial year.

Whether there is a purpose of profit as well as a prospect of profit from the activity

A business must have a purpose as well as a prospect of profit. This includes planning and activity that is directed towards making a profit and being able to demonstrate how that profit is to be made. The taxpayer has

researched the market for this type of rental accommodation in their area and estimated start-up costs and income from this activity once established. While the taxpayer has a purpose of profit, the prospect will be uncertain until the taxpayer is undertaking this activity and can make decisions based on its financial performance. During the relevant financial year the taxpayer will not make a profit from the activity as there will be no dwellings let on the property.

Whether there is repetition and regularity of the activity

Activity must be undertaken on a continuous and repetitive basis, as appropriate to the industry, for it to be considered a business. The taxpayer and their spouse anticipate spending 20 hours a week each through the initial preparatory stage of their activity up to and including the time they can begin taking paying guests. Prior to that time the taxpayer and their spouse are planning to live in the cottage as caretakers of the property, and to write policies and procedures in the hope that they will be able to employ others as caretakers of the rental property at this location. The taxpayer has other full-time work that provides an income. There will not be repetition and regularity of renting out dwellings on the property in the relevant financial year.

Whether the activity is of the same kind and carried on in a similar manner to that of the ordinary trade in that line of business

An activity can more readily be recognised as commercial if it is of same kind and carried on in a similar manner to other businesses in the same industry. The taxpayer's anticipated costs for the relevant year include council rates, water, electricity, and insurance. The taxpayer will not be letting out any dwellings and earning income in the relevant financial year.

Whether the activity is planned, organised, and carried on in a businesslike manner such that it is directed at making a profit

An activity can more readily be characterised as a business when it is carried on in a planned, organised, and businesslike manner such that it is directed at making a profit. The taxpayer intends to keep their business records on a web-based application that will allow the taxpayer to meet their taxation obligations. The taxpayer intends to make space available in the caretaker's cottage to keep and maintain their records. During the relevant financial year the taxpayer will not be carrying out an activity of letting any dwellings on the property to make a profit.

The size, scale, and permanency of the activity

An activity would be expected to be of a size, scale, and permanency suitable to the industry it is operating in to be recognised as a business. The taxpayer's short-term rental activity is still in the planning stages and is yet to be brought to the point that it is capable of producing income. Letting out one relocatable dwelling on a property would not be regarded as carrying on a business. It would be viewed as an investment activity.

During the relevant financial year there will be no dwellings on the property being let.

Summary of these indicators

The taxpayer's activity in the relevant financial year can be characterised as preparatory to being in business. The taxpayer has not commenced commercial operations, the proposed initial offering is on small scale, and the prospect of profit uncertain. The taxpayer is not in business with the rental letting activity in the relevant financial year.

As the taxpayer is not in business with their rental letting activity, the taxpayer will not be able to claim holding costs for the vacant land in the relevant financial year.

Can expenses associated with renting the proposed properties in the relevant year be claimed under section 8-1?

The ATO ruled no. Income from letting rental properties is assessable income under section 6-5 of the ITAA 1997. A wide range of expenses associated with generating income from a rental property can be claimed as deductions under section 8-1 of the ITAA 1997. These expenses can only be claimed for periods in which the property is rented or genuinely available to rent, must be apportioned to the extent the property has been used for private purposes, and do not include capital costs. To be considered genuinely available to rent a property must be advertised as available to rent and tenants reasonably likely to rent it.

The expenses a taxpayer can claim under section 8-1 of the ITAA 1997 are limited if they are specifically excluded by another section of that Act. Expenses relating to travel to and from rental properties are excluded for property investors under section 26-31 of the ITAA 1997 but can be claimed if the taxpayer is carrying on a business of rental letting.

In the taxpayer's case, the taxpayer will not be advertising the proposed relocatable dwelling as available to rent until the year following the relevant financial year. As these properties will not be generating income or genuinely available to rent, and the taxpayer is not carrying on a business, the taxpayer cannot claim any deductions for expenses associated with their letting under section 8-1 of the ITAA 1997 in the relevant financial year.

Can a deduction for decline in value or capital works be claimed prior to letting the proposed rental properties?

The ATO ruled no. Costs associated with the establishment of assets used to generate income are deductible over a period of time as the cost of a decline in value of depreciating assets or capital works expenses (Division 40 and Division 43 of the ITAA 1997).

The taxpayer will not be able to claim deductions for decline in value or capital works for their proposed relocatable dwelling or caretaker's cottage until installation or construction is complete and they are rented or advertised as genuinely available to rent (held ready for use for a taxable purpose). The taxpayer will not be able to claim a decline in value or capital works deduction for them in the 2023-24 financial year.

ATO Reference *Private Binding Ruling* Authorisation *No. 1052189247745*
w https://www.ato.gov.au/law/view/document?docid=EV/1052189247745

6.8 Savings account interest not derived

Facts

X arrived in Australia as a refugee and was permitted to stay in Australia under a refugee subclass 200 visa.

X is an Australian resident for tax purposes.

X holds a savings account in their home country. The bank account has become inactive. For security reasons, X cannot return to their home country to activate the bank account, or travel to any other country where the bank has branches.

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There are no branches of the bank in Australia. X cannot access online services or use a power of attorney in these countries to activate it for X.

Every 6 months X was expected to receive interest back into the bank account. This amount was added to the total unless X gave notice that they wanted to withdraw it. X has no current control over where the interest is held.

X has not withdrawn any amounts from those accounts in the income years subject to this ruling.

Question

Is the interest received from the bank assessable as ordinary income under section 6-5 of the ITAA 1997?

Ruling

The ATO ruled no.

Generally, the receipt of interest to a savings account is ordinary income under section 6-5 of the ITAA 1997. However, where the funds are locked to an account, or inaccessible to X until a condition of release is met, the funds will not be derived until the condition of release is met and the funds are accessible or can be dealt with in any way, on behalf of X, or as X directs.

The case *Commissioner of Taxes (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1938) 63 CLR 108, noted that for income to be derived, the object is to discover what gains have occurred during the period of account 'come home' to the taxpayer. This establishes that for a receipt of ordinary income to be assessable under section 6-5 of the ITAA 1997 it must 'come home' to the taxpayer.

Although interest was credited to X's account, X was not able to access the funds, or have them applied or dealt with in any way on X's behalf or as X directed. X was notified that the bank account was deactivated, and no withdrawals would be possible. The funds are not accessible to X and X cannot deal with them in any way.

Therefore, the ATO concluded that the interest amounts paid into the bank account have not 'come home' to X and X has not yet derived the interest amounts. The interest amounts were not assessable as ordinary income.

ATO Reference *Private Binding Ruling* Authorisation *No. 1052179264429*
w https://www.ato.gov.au/law/view/document?docid=EV/1052179264429

6.9 Rental income in advance used to offset sales price of property

Facts

The taxpayer is an Australian resident for tax purposes.

On XX XX 20XX, the taxpayer signed a Promissory Contract of Sale and Purchase of a property and owns a property in Country Y. On XX XX 20XX, signed a Promissory Lease Agreement for Non-Dwelling Purposes.

The taxpayer entered into the lease with a tenant. The lease is enforceable for X years, with no renewal. The total amount of rent due to the taxpayer for the full X-year period of the lease was payable on the date of signature and deed of sale and purchase.

The taxpayer received an amount totalling XXX,XXX, which comprised of monthly rent of X,XXX, which corresponds to annual income of XX,XXX.

The prepaid rental income the taxpayer received was subject to withholding tax rate of 25%.

The withholding tax has been paid in Country Y.

The taxpayer is required to repay all the rental income received plus a XX% penalty if the taxpayer dishonours the lease. If the tenant dishonours the lease, the tenant is not entitled to a pro-rata refund.

To complete the purchase of the property, the taxpayer paid the vendor $XXX,XX AUD. The payments were made in 7 instalments. The taxpayer only paid the net amount owing as the prepaid rental income paid by the tenant was used to offset the purchase price.

On XX XX 20XX, the property settled and was immediately available for rent.

Question

Will the rental income received in advance and used to offset the purchase price of the property, be included in taxpayer's assessable income progressively over the term of the lease for the purposes of subsection 6-5(2) of the ITAA 1997?

Ruling

The ATO ruled no.

Under to subsection 6-5(4) of the ITAA 1997, the taxpayer was entitled to direct that the advanced rent amount be used to reduce the purchase price of the property. When a taxpayer is able to direct how income is dealt with, the taxpayer is taken to have received an amount of income at the time the amount is credited and made available to the taxpayer to do with as the taxpayer wishes.

According to paragraph [4] of Income Tax Ruling IT 2167 - *Income tax: rental properties - non-economic rental, holiday home, share of residence et. Cases, family trust cases,* the amount received as rent or in respect of the lease of the property is assessable income.

The ATO considered *ATO Interpretative Decision* ATO ID 2003 but distinguished the facts in this case.

According to the terms of the lease in this case, the tenant does not have a right to a pro rata refund if they want to vacate the property. Therefore, the taxpayer has nothing further to do to 'earn' the income.

For the purposes of subsection 6-5(2) of the ITAA 1997, the rental income received in advance is assessable in full, in the income year it was derived.

If the taxpayer is required to refund any prepaid rent to the lessee, the refund would be deductible under subsection 51(1) of the ITAA 1997.

COMMENT – as the facts refer to "offset" of the prepaid rent against the purchase price, it is assumed that the lease was granted to the vendor or a related entity of the vendor.

COMMENT – *ATO Interpretative Decision* ATOID 2003/526 discusses a situation where a tenant is entitled to a refund for any unexpired portion of the lease term if the lease ends early. In that case, the rent is

derived progressively over the term of the lease, even though it is paid in advance, consistent with the reasoning in *Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation* [1965] HCA 58,

ATO reference *Private Binding Ruling Authorisation No. 1052207067376*
w https://www.ato.gov.au/law/view/document?docid=EV/1052207067376

7. ATO and other materials

7.1 Crack the code on Division 7A – avoid common errors

The ATO has indicated that in 2024 it will be working in partnership with professional associations to raise awareness in regard to private companies' obligations to comply with Division 7A.

The ATO highlights basic common errors where companies have previously failed to comply. These include:

1. keeping adequate records;
2. properly accounting for report payments and use of company assets by shareholders and associates; and
3. complying with rules around Division 7A loans

The ATO emphasises that understanding Division 7A is essential in order to:

1. make informed decisions when receiving private company money and using private company assets; and
2. avoiding unexpected and undesirable tax consequences.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/tax-professionals-newsroom/crack-the-code-on-division-7a-avoid-common-errors

7.2 Last-in first-out method for the holding period requirement

The ATO has updated its guidance in relation to how to apply the last-in first-out (**LIFO**) method for the holding period requirement for a franking offset entitlement.

Generally, to be eligible for a tax offset for a franking credit, a taxpayer is required to hold the shares bought on or after 1 July 1997 'at risk' for at least 45 days (90 days for preference shares and not counting the day of acquisition or disposal). This requirement only applies if the taxpayer's total franking credit entitlement for the year of income is $5,000 or more.

In order to work out which shares are subject to testing under the holding period requirement, the ATO guidance states that the LIFO method must be applied where the shares are substantially identical over the relevant period.

The ATO guidance further provides that the LIFO method groups together the primary securities and related securities a taxpayer holds in a company. Once the group is established, any sales of shares from the group are taken to be on a LIFO basis. The ATO guidance covers the meaning of 'related securities' and what should not be included in the grouping for the LIFO method.

The ATO guidance requires that the LIFO method be applied consistently across the taxpayer’s securities portfolio.

w https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/imputation/in-detail/last-in-first-out-method-for-the-holding-period-requirement

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7.3 Superannuation contributions caps to be increased in July

The concessional contributions cap increases in increments of $2,500 in line with the statistical measure of average weekly ordinary time earnings (AWOTE). The non-concessional contributions cap is reviewed annually to remain in line with AWOTE.

Based on the latest AWOTE statistics published by the Australian Bureau of Statistics, effective 1 July 2024, the contribution caps for superannuation will increase as follows:

1. the concessional contributions cap will increase from $27,500 to $30,000; and
2. the non-concessional contributions cap will increase from $110,000 to $120,000. Accordingly, the maximum available under the non-concessional contribution bring forward provisions will increase from $330,000 to $360,000.

w https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earningsaustralia/latest-release

7.4 Employer audits to surge

Accountants Daily published an article on 19 February 2024 warning tax agents and their clients that the ATO is increasing their random and risk-based audits. The ATO is particularly focusing on broad-based reviews of all employer obligations of a business, including PAYG, superannuation and FBT as a part of its Random Enquiry Program (**REP**). The ATO did not comment on how long the REP would last for or how many businesses it would audit.

The ATO recommended that businesses ensure that they are maintaining thorough records and deadline tracking, that businesses check their governance process for reporting, and that amounts are paid into the right account ahead of payday super starting in 2026.

w https://www.accountantsdaily.com.au/regulation/19625-employer-audits-to-surge-ato-warns

7.5 FBT time is just around the corner

The ATO has released a reminder that FBT lodgment time is approaching.

The reminder summarises what employers need to do during FBT lodgment season. Employers with an FBT liability for the current FBT year, being 1 April 2023 to 31 March 2024, need to lodge an FBT return and pay the amount due by 21 May 2024.

The reminder also refers to the ATO's new practical compliance guideline PCG 2024/2 which sets out the short cut method to work out the cost of charging electric vehicles at an employee's home for FBT purposes (see our February 2024 notes for more detail).

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/fbt-time-is-just-around-the-corner

7.6 ATO tips on tax concessions for small businesses

On 16 February 2024, the ATO published guidance on its website in relation to the eligibility of small business owners for tax concessions.

Generally, if a taxpayer has an aggregated turnover of less than:

1. $2 million, the taxpayer may be eligible for the small business capital gains tax (**CGT**) concessions;
2. $5 million, the taxpayer may be eligible for small business income tax offsets; and
3. $10 million, the taxpayer may be eligible for the small business restructure roll-over.

The guidance contains links to detailed information in relation to the eligibility criteria for each the above concessions and how to work out the concession amount.

The ATO website further states that the taxpayer would need to keep records for 5 years to prove any claims for concessions.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/is-your-business-eligible-for-concessions

7.7 Are you eligible for capital gains tax concessions?

The ATO is encouraging taxpayers to check that their small business qualifies for the 15-year exemption from capital gains tax by seeking professional help and advice from registered tax professionals and following tips from the ATO website.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/are-you-eligible-for-capital-gains-tax-concessions

7.8 Overdue TPAR? Act now to avoid penalties

The ATO has published a reminder about overdue Taxable Payments Annual Reports (**TPAR**). Businesses who pay contractors to provide certain services may need to lodge a TPAR by 28 August each year.

From 22 March, the ATO will apply penalties to businesses who have not lodged their TPAR from 2023 or previous years and have received 3 reminder letters regarding the overdue TPAR.

In 2023, the ATO issued approximately $18m in penalties to more than 11,000 businesses.

Businesses who do not need to lodge a TPAR can submit a non-lodgment advice form. This form can also be used by Businesses to indicate a TPAR will not need to be lodged in future years.

w https://www.ato.gov.au/businesses-and-organisations/small-business-newsroom/overdue-tpar-act-now-to-avoid-penalties

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7.9 Registered emissions units

The ATO has published website guidance on registered emissions units on 14 February 2024.

A registered emissions unit (**REU**) is a unit registered in the Australian National Registry of Emissions Units. Holders of REUs are taxed on REUs exclusively under Division 420 of the ITAA 1997.

A holder of an REU, with the exception of an Australian carbon credit unit (**ACCU**), can claim a deduction for the costs of acquiring the REU in the year the holder commenced holding the REU.

A holder of an REU must include the change in value of REUs held over the income year in their tax return. Where the value of the REUs held at the end of the year is more than the value of the REUs held at the beginning of that year, the difference must be included as part of the holder's assessable income. Where the value of the REUs held at the end of the year is less than the value of the REUs held at the beginning of that year, the holder may claim a deduction equal to that difference.

The value of the REUs held at the start of an income year is the same as the value of the REUs held at the end of the previous income year. The value of REUs held at the end of the income year can be worked out using the first-in first-out cost method, actual cost method and the market value method. A choice must be made before the lodgement of the first income tax return. Where no choice is made, the FIFO cost method applies.

A choice cannot be revoked and must be used for at least 4 income years, and is subject to the following limitations:

1. the actual cost method cannot be chosen for the current income year if the FIFO cost method was used for the most recent income year in which REUs were held at the end of the income year; and
2. the choice must be made before lodgement of the income tax return for the income year that a change of choice is made.

On disposal of a REU, the amount the holder is entitled to receive on disposal is included as assessable income in the income year in which the holder ceased to hold the unit.

The ATO website provides worked examples on accounting for REUs from purchase to disposal.

The basic tax treatment of REUs is modified in the following circumstances:

- non arm's length transactions or transactions not at market value
- disposal of REUs for a purpose other than gaining assessable income
- death of the holder
- eligible Australian carbon credit units held by eligible individual primary producers
- REUs becoming or ceasing to be taxable in Australia.

TIP – while holder of an ACCU cannot claim a deduction for the costs of acquiring the REU under Division 420, the holder may still be able to claim a deduction if the expenditure incurred in acquiring the ACCU is deductible under section 8-1 of the ITAA 1997, with the key consideration being whether or not such expenditure is capital in nature.

w https://www.ato.gov.au/businesses-and-organisations/income-deductions-and-concessions/income-and-deductions-for-business/registered-emissions-units

7.10 Advice under development – capital gains tax issues

On 2 October 2023 the ATO advised that it is currently drafting a determination on back-to-back CGT roll-overs in a variety of arrangements, including where roll-overs are used in conjunction with another roll-over or transaction and roll-overs with a 'nothing else' requirement. As of 4 March 2024, the expected date for completion is unknown.

On October 2023 the ATO additionally advised that it is drafting a determination to clarify whether certain CGT assets, such as water access entitlements, are 'taxable Australian real property' under Division 855 of the ITAA 1997. This determination is also anticipated to include a consideration of water access requirements conferred by state and territory legislation. This extra consideration has pushed back the expected date for completion, and as of 4 March 2024, the expected completion date is unknown.

w https://www.ato.gov.au/about-ato/ato-advice-and-guidance/advice-under-development-program/advice-under-development-capital-gains-tax-issues

7.11 Service commitment between the ATO and the Australian Bar Association

The ATO and the Australian Bar Association (ABA) have agreed to a service commitment to ensure barristers are able to meet their taxation and superannuation obligations effectively.

The commitments include encouraging voluntary compliance, fostering a cooperative relationship between barristers and the ATO, and providing support and education to barristers regarding their tax and super obligations.

The ATO and the ABA agree to work together to assist Australian barristers by:

1. providing guidance material and/or continuing professional development to barristers about compliance with their taxation and superannuation obligations; and
2. explaining and educating barristers about the link between meeting their taxation and superannuation obligations and discharging their professional and ethical obligations to the profession and the consequences of non-compliance.

Barristers who have difficulties in meeting lodgment commitments, due dates for payment or existing payment arrangements that have not been properly dealt with through the normal and usual ATO channels, are encouraged to email their query to LegalProfessionRelationships@ato.gov.au. Queries will be acknowledged by the ATO within three business days.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/your-practice/legal-practitioners/ato-and-aba-service-commitment

7.12 Decision Impact Statement – Commissioner of Taxation v Wood

On 21 February 2024, the Commissioner of Taxation issued a decision impact statement in relation to the case of *Commissioner of Taxation v Wood* [2023] FCA 574.

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The case concerned whether a payment made by a taxpayer to settle litigation after his relevant employment ended was deductible under section 8-1 of the ITAA 1997 because it was incurred in gaining or producing assessable income and not capital or of a capital nature.

The Court considered that the settlement sum and release under the settlement deed were to bring an end to litigation, which had as its source the taxpayer's employment. This was a closer and more immediate connection than a mere factual causation on a 'but for' basis.

The Court rejected the Commissioner's characterisation of the Settlement Sum as a loss or outgoing of capital or of a capital nature and held that it was a payment to protect Wood's reputation in the finance industry.

The Court observed that the deed of release was primarily aimed at protecting Wood's reputation in the future, and to compensate him for any defamation in the past rather than the Settlement Sum and releases under the settlement deed. To characterise the Settlement Sum as capital or of a capital nature would elide a different nature and purpose behind the settlement deed and the deed of release when they were legitimately directed to different ends.

The Commissioner accepted that, on the facts, this conclusion was available to the Court. It is also the Commissioner's view that this decision has limited application beyond its own factual circumstances and does not represent a departure from established principles concerning section 8-1 of the ITAA 1997.

w https://www.ato.gov.au/law/view/document?docid=LIT/ICD/NSD1162of2022/00001

7.13 Commissioner's address to the National Press Club

On 21 February 2024, the Commissioner addressed the National Press Club for his final time. The Commissioner spoke about the changes that the ATO has implemented over the last decade which have improved the tax administration and business landscape within Australia, including:

1. the sharing economy reporting regime;
2. the refreshed website;
3. commitment to tax compliance;
4. crackdown on tax avoidance;
5. utilisation of tax gap analysis to improve compliance; and
6. a shift from punitive to preventive measures.

The Commissioner also announced that there will be measures put in place to address the illegal early access of funds from SMSF.

Addressing challenges post-COVID, the ATO is focused on reducing fraud and debt, implementing safeguards, and enhancing cybersecurity. The Commissioner expressed concern about sophisticated fraud attempts and emphasised the importance of protecting data in the face of increasing cyber threats.

The Commissioner ended his speech with some comments regarding the future direction of the ATO. Such as:

1. the ATO will be completely digital by 2030, providing real time tax reporting and payment information;
2. the ATO will be simplifying compliance programs; and
3. the ATO intends to align with other revenue agencies across the world.

w https://www.ato.gov.au/media-centre/commissioner-s-address-to-the-national-press-club-2024

8. Tax Professionals

8.1 Important changes to Tax Agent Services Act and Code

The government has made changes to the *Tax Agent Services Act 2009* (TASA) through the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023*.

Breach reporting

From 1 July 2024, new obligations will be introduced as follows:

1. obligation for registered tax agents and BAS agents to self-report to the TPB if they have significantly breached the Code of Professional Conduct; and
2. obligation for registered tax agents and BAS agents to notify the TPB in writing if they have reasonable grounds to believe that another registered tax agent or BAS agent has significantly breached the Code of Professional Conduct.

The obligation to report arises within 30 days of the registered tax agent or BAS agent becoming aware of the significant breach, or when they first have or ought to have reasonable grounds to believe there was a breach. These obligations apply to breaches occurring on or after 1 July 2024.

Failure to comply with these obligations is itself a breach of the Code of Professional Conduct and may also be an offence.

Updates to Code of Professional Conduct

In December 2023, Treasury released exposure draft *Tax Agent Services (Code of Professional Conduct) Determination 2023*. The instrument complements the changes made to the *TASA* by the *Treasury Laws Amendment (2023 Measures No. 1) Act 2023*.

The key changes in the Code include:

1. express obligation for registered tax agents and BAS agents to uphold and promote the ethical standards of the tax profession;
2. a registered tax agent or BAS agent must not make any statements to the TPB, the Commissioner or any Australian government agency that the agent knew or ought reasonably to have know was false, incorrect or misleading;
3. the agent is required to take all necessary steps to correct if they become aware that a statement was false, incorrect or misleading;
4. new express obligation for registered tax agents and BAS agents to disclose and avoid conflicts of interest with government;
5. express obligation to maintain confidentiality in dealing with government;
6. updated requirements in relation to record keeping, quality assurance and internal controls; and
7. a new requirement to advise all current and prospective clients, in writing and in a clear and unambiguous way of all of the following:
   (a) any matter that could be reasonably relevant and material to a decision by a client to engage or continue to engage the agent;
   (b) upon engaging or re-engaging the client, that the TPB maintains a register of tax agents and BAS agents and how they can access and search the register;

(c) upon engaging or re-engaging the client, how the client can make a complaint to the TPB, including the complaints process of the TPB.

The TPB website includes a table setting out the key recent changes and the dates that they come into effect. These include the changes related to engaging disqualified entities (see our February 2024 tax training notes).

w https://www.legislation.gov.au/C2023A00101/latest/text
w https://treasury.gov.au/consultation/c2023-469627
w https://www.tpb.gov.au/important-changes-tax-agent-services-legislation

8.2 Annual registration for tax practitioners is coming

From 1 July 2024, the registration period for tax practitioners will be changed from at least once every 3 years to at least once a year. The application fee payable for annual registration is yet to be determined.

The new annual registration period applies from the next renewal date that occurs from 1 July 2024. For example, if a tax practitioner has applied to renew their registration before 1 July 2024, they will be registered for 3 years, and their next renewal, in 2027, will be for a one-year period.

Annual registration will:

1. remove the need for tax practitioners to submit an annual declaration with the TPB;
2. align with other regulatory obligations, such as maintaining professional indemnity insurance;
3. not affect continuing professional education requirements. The minimum yearly requirement for hours completed will remain at 20 hours for tax and BAS agents; and
4. apply to both new registrations and renewal applications submitted on or after 1 July 2024.

Outcomes of new registration applications will be processed and determined by the TPB within 4 months instead of 6 months. If an applicant does not receive a final decision within 4 months, the application is considered rejected. Rejected applications are able to be reviewed.

In relation to applications to renew a registration, tax practitioners may work under their current registration until a decision is made by the TPB.

w https://www.tpb.gov.au/annual-registration-coming

8.3 FAQs – tax practitioners providing services in relation to State or Territory tax laws

The TPB has updated its website FAQs in relation to tax practitioners providing services in relation to State or Territory laws. The FAQs address the following:

1. what 'other services' tax practitioners may provide in relation to State and Territory laws;
2. the TPB’s expectations for registered tax practitioners providing other services; and
3. the consequences for registered tax practitioners for misconduct under the TASA.

The TPB considers that 'other services', in relation to State and Territory laws, include lodgement and advisory services associated with payroll tax, stamp duty and levies. The TPB advises that tax practitioners providing these other services should:

3. always ensure that the provision of such services is lawful under the relevant state or territory laws;
4. exercise sound professional judgement, take reasonable care and ensure that they have the requisite training, competence and experience to support the needs of their clients; and
5. be guided, generally, by the legal and ethical standards in the TASA in addressing other services.

The TPB cautions tax practitioners that their work may be impacted by other State and Territory legislation and rules. For example, tax practitioners should be aware that if their work constitutes legal services, they will be subject to the relevant state or territory legal profession legislation and will be regulated by the relevant law society.

Where a tax practitioner has engaged in misconduct involving other services relating to State or Territory tax laws, the tax practitioner's ongoing eligibility for TPB registration may be affected.

w https://www.tpb.gov.au/faqs-tax-practitioners-providing-services-relation-state-or-territory-tax-laws

8.4 Supported lodgment program for tax professionals

On 11 February 2024, the ATO updated its information on the supported lodgment program for tax professionals where their whole practice has been affected by unforeseen events such as ill health, loss of a key staff member or a natural disaster.

The program is available to practices of all sizes when additional time is required to lodge a large proportion of their clients' taxation obligations with the ATO. Tax professionals may not be eligible for the program if the circumstances are of their own making, within their control or where there has been non-compliance with the conditions of previous supported lodgment programs.

If eligible, the ATO will assist tax professionals with tailoring solutions to get their lodgment program back on track, including:

1. identifying overdue lodgment obligations and current lodgment program commitments;
2. removing clients that are not actively represented by the practice;
3. prioritising overdue and upcoming obligations of the practice; and
4. applying lodgment deferrals and, in some instances, suspending compliance action.

If the ATO provides a supported lodgment program, the ATO will require that tax professionals:

1. keep their own taxation obligations up to date;
2. take reasonable action to resolve the issues that have caused them to fall behind with lodgments;
3. remove clients that the practice is not actively representing from their ATO client list;
4. only take on new clients if their documents can be lodged on time; and
5. plan how the client base will be managed once the program is completed.

The ATO will not consider lodgment deferrals or suspension action for clients who have been referred for prosecution.

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Tax professionals can apply for a supported lodgment program by submitting a request through practice mail in Online Services for Agents.

w https://www.ato.gov.au/tax-and-super-professionals/for-tax-professionals/prepare-and-lodge/lodgment-program-deferrals/supported-lodgment-program

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